Supreme Court, U.S.
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No. 04 37

In The
Supreme Court of the United States

MICHAEL CLINGMAN, GLO HENLEY, KENNETH MONROE, THOMAS PRINCE AND THE OKLAHOMA STATE ELECTION BOARD,

Petitioners,

v.

ANDREA L. BEAVER, FLOYD TURNER, MINELLE L. BATSON, MARY V. BURNETT, SHARON LYNN ATHERTON, ROGER BLOXHAM, STEVE GALPIN, RICHARD P. PRAWDZIENSKI, MICHAEL CLEM, WHITNEY L. BONTIN, JR., CHRISTOPHER S. POWELL, CHARLES A. BURRIS AND THE LIBERTARIAN PARTY OF OKLAHOMA A/K/A LIBERTARIAN POLITICAL ORGANIZATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether Oklahoma's semi-closed primary election law – which allows a political party to invite non-affiliated voters but not voters registered with another political party to vote in its partisan primary but prevents a voter registered with another political party from voting in that primary – violates the First Amendment rights of a political party and its members to associate.

II. Whether the decision in *California Democratic Party v. Jones*, 530 U.S. 567 (2000) requires that a State allow a political party, at its option, to open its political party primary election to any registered voter regardless of that registered voter's political affiliation.

III. Whether the Tenth Circuit Court of Appeals erred in finding that the State of Oklahoma's restrictions constituted a severe burden on the right of association of the political party thereby requiring the regulation to be narrowly tailored to meet a compelling state interest or whether the appropriate standard is the balancing test which has been applied in election cases before this Court.

LIST OF PARTIES

The parties to this proceeding on Petition for Writ of Certiorari are:

Petitioners:

Michael Clingman, Secretary of the Oklahoma State Election Board; Glo Henley, Chairman of the Oklahoma State Election Board; Kenneth Monroe, Vice Chairman of the Oklahoma State Election Board; Thomas E. Prince, Member of the Oklahoma State Election Board

and

Oklahoma State Election Board

Defendants in the District Court and Appellees in the United States Court of Appeals for the Tenth Circuit

Respondents:

Andrea L. Beaver, Floyd Turner, Minelle L. Batson, Mary V. Burnett, Michael L. Seymour, Terry L. Beaver, Robert T. Murphy, Sharon Lynn Atherton, Roger Bloxham, Steve Galpin, Richard P. Prawdzienski, Michael A. Clem, Whitley L. Bontin, Jr., Christopher S. Powell, Charles A. Burris and the Libertarian Party of Oklahoma a/k/a Libertarian Political Organization

Plaintiffs in the District Court and Appellants in the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Michael Clingman, Glo Henley, Kenneth Monroe, Thomas Prince and the Oklahoma State Election Board respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Tenth Circuit reversing the decision and Order of the United States District Court for the Western District of Oklahoma's granting judgment on behalf of the Petitioners following a non-jury trial. The opinion of the Court of Appeals is reported as *Beaver v. Clingman*, 363 F.2d 1048 (10th Cir. 2004). See App. 1.

The opinion of the district court is unreported. See App. 24.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered its Order reversing the district court's opinion on April 6, 2004. Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). The Petition for Writ of Certiorari is timely filed within 90 days of April 6, 2004.

STATUTORY AND CONSTITUTIONAL PROVISIONS

United States Code, Title 42:
§ 1983. Civil Action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit or equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.)

Amendment I to the Constitution of the United States:

> Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment XIV (Section 1) to the Constitution of the United States:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

26 Oklahoma Statutes Annotated, § 1-104:

> A. No registered voter shall be permitted to vote in any Primary Election or Runoff Primary Election of any political party except the political party of which his registration form shows him to be a member, except as otherwise provided by this section.
>
> B.1. A recognized political party may permit registered voters designated as Independents pursuant to the provisions of Section 4-112 of this title to vote in a Primary Election or Runoff Primary Election of the party.
>
> 2. The state chairman of the party shall, between November 1 and 30 of every odd-numbered year, notify the Secretary of the State Election Board as to whether or not the party intends to permit registered voters designated as Independents to vote in a Primary Election or Runoff Primary Election of the party. If the state chairman notifies the Secretary of the State Election Board of the party's intention to so permit, registered voters designated as Independents shall be permitted to vote in any Primary Election or Runoff Primary Election of the party held in the following two (2) calendar years. If the state chairman of one party notifies the Secretary of the State Election Board of the party's intent to so permit, the notification period specified in this paragraph shall be extended to December 15 for the state chairman of any other party to so notify or to change prior notification. A registered voter

designated as Independent shall not be permitted to vote in a Primary Election or Runoff Primary Election of more than one party.

3. Failure to so notify the Secretary of the State Election Board shall serve to prohibit registered voters designated as Independents from voting in a Primary Election or Runoff Primary Election of the party.

STATEMENT OF THE CASE

1. Plaintiffs/Respondents to this action were registered Oklahoma voters and a then-recognized political party who filed the original action pursuant to 42 U.S.C. § 1983 alleging that certain Oklahoma election statutes violated their First Amendment rights to freedom of political association and free speech.

2. Plaintiffs specifically attacked 26 O.S. § 1-104(A) and § 1-104(B)(4), as impermissibly preventing a recognized political party in Oklahoma from opening up its Primary and Runoff Elections to all Oklahoma registered voters regardless of political party affiliation.

3. Political party nominees are chosen in Oklahoma through the use of the primary election format.

4. There are at least four types of primary elections in the United States, although there are some variations within these general species. The four general types of political primary may be referred to as the closed primary, the semi-closed primary, the open primary and the blanket primary. In the closed primary election system, there is a separate primary ballot for each party. No crossover voting is allowed. In the semi-closed primary system, there is a

separate primary ballot for each party, but independents are permitted to vote in a primary election if the party chooses to permit voting by independents. In the open primary system, all voters may, regardless of registration or party affiliation, choose the primary in which they will vote in that primary election. In the blanket primary system, each voter can choose which primary he or she will vote in for each separate office.

5. Under those Oklahoma statutory provisions, a voter registered with a specific political party may vote only in that party's primary and runoff elections. A political party may allow independent voters to vote in its primary and runoff elections under 26 O.S. § 104. Oklahoma's system is considered a semi-closed primary system.

6. Plaintiffs sought declaratory judgment declaring those Oklahoma statutes unconstitutional and requested injunctive relief prohibiting Defendants from enforcing those provisions. Plaintiffs sought to create a "party-option open primary" in which the decision of whether to have an open, closed or semi-closed primary and runoff election is left totally to the discretion of the political party.

7. Plaintiffs' original request for a preliminary and/or temporary injunction was heard by the Court. That request was denied following an evidentiary hearing with the Court finding that there was little likelihood of success on the merits of Plaintiffs' claims.

8. A non-jury trial was conducted before the Honorable Stephen F. Friot, United States District Judge for the Western District of Oklahoma. Following the non-jury trial, the district court issued a Memorandum Opinion finding that the Oklahoma election statutes in question

were constitutional as written and as applied and entered judgment on behalf of the Defendants. (See App. 24).

9. Plaintiffs/Respondents filed an appeal with the Tenth Circuit Court of Appeals. In reversing the decision of the trial court, the Tenth Circuit Court of Appeals determined that the trial court had employed the wrong standard of review and that under strict scrutiny, the challenged statutes were unconstitutional as improper infringements on the Plaintiffs' freedom to associate. (See App. 1).

10. The only statewide primary election for the Libertarian Party during the 2000 election cycle was the primary election for the Libertarian Party nominees for Corporation Commissioner.

11. During the 2000 election cycle, there were 430 registered Libertarian Party members eligible to vote in the Libertarian primary election.

12. By notice to the Oklahoma State Election Board, the Libertarian Party permitted independent voters to vote in its 2000 primary election. There were 2,049 votes cast in that 2000 Libertarian Party primary election for Corporation Commissioner.

13. The number of votes cast signifies that at least 1,619 more independent voters voted than potentially eligible registered Libertarian Party members and suggests that the Libertarian Party candidate was selected by registered independent voters. No other Libertarian Party primary election was conducted in any other race in the year 2000 and no Libertarian Party runoff election was conducted in the State of Oklahoma in the year 2000.

14. There were no Libertarian Party primary elections during the 1998 election cycle.

15. There were 30 registered Libertarian Party members eligible to vote in the Libertarian Party primary election in 1996.

16. The only Libertarian Party primary election during the 1996 elections was a primary election to select the Libertarian party candidate for the United States Senate in which a total of 2,940 votes were cast.

17. The number of votes cast signifies that at least 2910 more independent voters voted in the Libertarian Party primary election to select the Libertarian Party nominee than potentially eligible registered Libertarian Party members suggests that the Libertarian Party candidate was selected by registered independent voters. There was no Libertarian Party runoff election in the State of Oklahoma at any level in 1996.

18. In a usual election year, there will be numerous political party primary elections. There were primary elections in Democratic races for three United States House of Representative seats and runoff elections in two of those races. There were primary elections in Republican races for four United States House of Representative seats. There were also numerous party primaries and runoffs in state house of representative races, state senate races and county office elections. There were no statewide primary or runoff elections for the Democratic or Republican Party nominees in 2000, as there was no U. S. Senate race or gubernatorial race.

19. During the 2000 election cycle, twenty-four percent (24%) of the primary and runoff races were decided by less than five percentage points with many races being decided by less than one percent (1%). A similar number of runoff and primary races held in 2002 state election cycles were decided by less than five percentage points.

20. The Libertarian Party failed to garner enough ballot support in the 2000 general election to retain political party status and is no longer considered a political party under Oklahoma statutes. Thus, the Libertarian Party does not have the ability or authority to conduct primary and runoff elections or place a candidate designated as a Libertarian on a ballot in Oklahoma under 26 O.S. §§ 1-104 and 1-109.

REASONS FOR GRANTING THE PETITION

FIRST QUESTION

In its opinion, the Tenth Circuit Court of Appeals incorrectly determined that the State of Oklahoma must allow a political party, if that party so chooses, to open its partisan primary and runoff elections to any registered voter, regardless of whether the voter is a member of that particular political party, registered as an independent or registered as a member of another political party. That opinion is in direct conflict with this Court's directives in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 107 S. Ct. 544, 93 L. Ed. 2d 514 (1986) and *Rosario v. Rockefeller*, 410 U.S. 752, 93 S. Ct. 1245, 36 L. Ed. 2d 1 (1973). In addition, the Court of Appeals incorrectly interpreted this Court's decision in *California Democratic*

Party v. Jones, 530 U.S. 567, 120 S. Ct. 2402, 147 L. Ed. 2d 502 (2000) that while a state may require a party's candidates to be selected by primary elections, that a state may not, to any extent, mandate how to control the manner in which the party chooses its candidates within the framework of that election.

In *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 224, 107 S. Ct. 544, 93 L. Ed. 2d 514, n. 13 (1986), this Court gave guidance as to the outcome of a request such as the one presented in this case. However, this is the first opportunity for this Court to reinforce or clarify its language in *Tashjian*. This case is also a matter of great public concern as almost one-half of the states currently have some form of a closed or semi-closed primary election.

In *Tashjian*, this Court was presented with the question of whether a state could prevent a political party from inviting independent or non-affiliated voters from voting in the Republican political party's primary election. This Court determined that because of the unaffiliated nature of the voters, a state did not have the interests protecting a political party from potential problems such as "party raiding" due to the unaffiliated nature of the invited voters and thus, could not prevent independent voters from being allowed to vote in the Republican Party's primary election, if the Republican Party so chose.

However, this Court was very careful to point out that a request such as the one made in this case to open a primary to voters registered as members of another political party, where state law prohibits such, "would raise a different combination of considerations" and "under such circumstances, the effect of one party's broadening of

participation would threaten other parties with the disorganization effects which the statutes in *Storer v. Brown*, 415 U.S. 724, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974), and *Rosario v. Rockefeller*, 410 U.S. 752, 93 S. Ct. 1245, 36 L. Ed. 2d 1 (1973) were designed to prevent." *Tashjian*, 479 U.S. at 224, 107 S. Ct. at 561.

The guidance from that language in *Tashjian*, which the Tenth Circuit chose not to follow, indicates that where the request is to open a primary to all voters, a state has an interest and may properly be concerned about "party raiding" on the party doing the inviting as well as the affect on the other political parties from which the voters are sought. Clearly, then, it is within the State's proper exercise of authority to enact or retain reasonable legislation to limit those perceived problems. While acknowledging *Tashjian*, the Court of Appeals totally disregarded that language and direction provided in *Tashjian*. Had the Tenth Circuit followed the guidance in *Tashjian*, the appeals court would have had to find the Oklahoma statutes constitutional.

Further, the Court of Appeals totally discounted the idea of "party raiding," despite the numerous cases in which this Court has found such activity to be an actual concern for which a state has the right to attempt to prevent or at least inhibit. "Party raiding," which has been defined as the "organized switching of blocs of voters from one party to another in order to manipulate the outcome of the other party's primary election," has been found to be a legitimate occurrence for which a State has a "particularized legitimate purpose of preventing." See *Storer v. Brown*, 415 U.S. 724, 731, 94 S. Ct. 1274, 1279, 39 L. Ed. 2d 714 (1974) citing *Rosario v. Rockefeller*, 410 U.S. 752, 83 S. Ct. 1245, 36 L. Ed. 2d 1 (1973). In *Burdick v. Takushi*,, 504

U.S. 428, 439-40, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992), this Court once again recognized the interest of a state in preventing "party raiding." Not only has "party raiding" been of concern historically to this Court, the phenomenon of "party raiding" and its effect on the electoral process was also recently recognized as a continuing, legitimate concern of the state in the primary election process in *California Democratic Party v. Jones*, 530 U.S. 567, 572, 120 S. Ct. 2402, 147 L. Ed. 2d 502 (2000). In *Jones*, 530 U.S. at 572, this court, citing *Rosario v. Rockefeller*, 410 U.S. 752 (1973), again reiterated that in order to prevent "party raiding" a "state may require party registration a reasonable period of time before a primary election."

Yet the Tenth Circuit Court of Appeals ignored the realities and probabilities of "party raiding" or similar activities and dismissed the interests of a state in preventing such activity in an effort to preserve the integrity of the electoral process. The Court of Appeals determined, in spite of this Court's previous findings, that party raiding does not occur and more importantly to this case, even if it did, such activity is not a legitimate concern for the state. This ruling is clearly in contrast with this Court's express finding in *Rosario v. Rockefeller*.

Under Oklahoma law, in order to vote, an individual must register with the State of Oklahoma. That individual may register as an independent or as a member of a particular political party and may actually register to vote until twenty-four days prior to the primary elections. A person seeking to change his political affiliation may change his political party affiliation up until June 1 of the election year, approximately only seven weeks prior to the primary election. In the present case, the Respondent party and individuals did not challenge those time restrictions for

registering as members of a certain political party prior to the primary elections as being unreasonable.

However, what the Court of Appeals has done, in essence, is to strike down the prior registration requirement at the discretion of each particular political party and allow election-day registration or affiliation with a political party in Oklahoma. While election day affiliations are not unconstitutional or inappropriate, neither is such permissive action required of a state. Oklahoma has chosen not to allow election day affiliations with political parties requiring instead that a person declare his or her affiliation some time before the primary elections. In basically striking the current voter registration time restrictions by requiring the State of Oklahoma to allow a registered member of one political party to effectively change his or her political party affiliation on the day of the primary or runoff election, the requirement from the decision of the Court of Appeals runs afoul of numerous decisions of this Court finding state requirements of pre-election political affiliation to be constitutional. *Rosario v. Rockefeller*, 410 U.S. 752 (1973) and *California Democratic Party v. Jones*, 530 U.S. 367 (2000).

In *Rosario v. Rockefeller*, 410 U.S. 752, 93 S. Ct. 1245, 35 L. Ed. 2d 1 (1973), this Court upheld state mandated party registration time restrictions, which was specifically designed to prevent "party raiding" which was defined by this Court as a process in which dedicated members of one party switch to another political party in an attempt to alter the outcome of the second party's primary. Just as important to the interests of the state, the registration time restrictions also protect a political party from having its members being drawn to a second political party in a purposeful attempt to alter or even incidentally affecting

the primary elections of the first political party. As recently as 2000, this Court has noted with approval that a state may require party registration a reasonable period of time prior to any primary election. In *Jones*, this Court even cited *Rosario* with approval and failed to overturn or limit *Rosario* and the registration requirement in any way. *Jones*, 530 U.S. at 572, 120 S. Ct. at 2407.

Incredibly, and in spite of the teachings of this Court, the Tenth Circuit Court of Appeals totally discounted what effect the Respondents' request for a party-option open primary could have on the remaining political parties and those parties' primary and runoff elections. Those possible effects are, however, a consideration for the state in passing legislation and for the Court in ruling on the appropriateness of such legislation.

Statistics presented to the trial court and the appellate court showed that nearly 24% of the state, county and local primary and runoff elections during the 1996, 2000 and 2002 election cycles were decided by five percent (5%) or less. A number of those races were decided by less than one percent (1%). To require a state to allow one political party, at that party's discretion, to open its primary and runoff elections to members of other political parties would create the instability which this court has ruled a state has the right to try to prevent.

This potential to alter primary elections of another political party, either purposefully or accidentally, is precisely the type of effect which this Court in *Rosario* determined was of valid concern and interest to the state. It is also that potential effect on a state's elections which this Court expressed concern over in *Tashjian*.

As the Tenth Circuit Court of Appeals decision striking down the Oklahoma statutes is contrary to the decisions of this Court and is erroneous, this Court should grant certiorari, address the issues as under *Tashjian v. Republican Party of Connecticut* and reverse the judgment of the Tenth Circuit Court of Appeals.

SECOND QUESTION

While the right to vote is a most fundamental right, neither the right to vote in any manner or the right to associate for political purposes are absolute. *Burdick v. Takushi*, 504 U.S. 428, 433, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992). It is axiomatic that a State has a responsibility in structuring and monitoring the election process. *California Democratic Party v. Jones*, 520 U.S. 567, 572. This necessarily includes reasonable regulation over the political parties and their primary elections.

However, the Court of Appeals basically determined that this Court's decision in *California Democratic Party v. Jones* requires a state in all partisan primaries to forego any regulation of a political party and requires the state to allow a political party to make its own determination as to which voters the party will allow to vote in its primary. In other words, a state is required to make its partisan primaries and runoff elections "party-option" open primaries. Such extension of the decision in *California Democratic Party v. Jones* is erroneous. The decision in *Jones* went to the issue of whether a state could require or force a political party to have its candidates chosen by all voters, not just party members.

This Court should grant certiorari to address the issue of whether *California Democratic Party v. Jones* is to be read to require all states to enact open primary laws or whether the case is limited to "blanket primaries" and the free acceptance of outside voters voting in a political party's primary election.

THIRD QUESTION

Where the burden on associational rights is severe, the challenged regulation must be narrowly tailored to address a compelling state interest. If, however, the burden is less severe, a lesser exacting review is appropriate. See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S. Ct. 1364, 137 L. Ed. 2d 589 (1997). As the Tenth Circuit Court of Appeals noted in its opinion in this case but then failed to follow, not every burden that a state statute or regulation imposes on associational rights in relation to election laws is a severe restriction requiring strict scrutiny. See *Burdick v. Takushi*, 504 U.S. 428, 433, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992).

In the decision at the trial court level, the district court concluded that the burdens placed on the associational rights of the Respondents were not severe and applied the balancing test per this Court's decisions in *Timmons*, *Burdick* and *Rosario*. However, the Tenth Circuit determined that the restrictions imposed were sufficiently severe to require strict scrutiny merely because the statute places some limitations on who may vote in a political party's primary election which in turn restricts the political party's ability to define the group of voters that may vote in its primary elections.

The determination that the restrictions imposed by the state statute are severe restrictions on political association thereby requiring a compelling state interest is erroneous. The burdens imposed are not severe burdens on Respondents.

Nothing in the Oklahoma statutes prevents a recognized political party from conducting primary elections. Nothing prevents a voter registered with one political party from timely registering with another political party and voting in that party's primary and runoff elections. Nothing prevents a registered voter from voting in the primary election for the political party for which the voter has registered. Nothing in the challenged Oklahoma statute locks a voter into an undesirable political party, deprives a voter of his right to associate with the political party of his choice, or denies the voter the opportunity to change party affiliations so long as the voter acts within the reasonably allotted time frame.

As the burdens on the associational rights are not severe, the proper test which should have been applied by the Tenth Circuit was the balancing test of *Timmons* and *Rosario*. Under that standard, the challenged statutes would be viewed as constitutional. The Tenth Circuit applied the incorrect standard of review resulting in an erroneous decision by the Court of Appeals.

This Court should grant certiorari to address the appropriate standard of review in this case.

CONCLUSION

This Court should grant certiorari to review the Tenth Circuit's decision: hold that the challenged statutes do not violate the First Amendment rights of any political party or registered voter; reverse the decision of the Tenth Circuit Court of Appeals and direct that judgment be entered on behalf of the Petitioners.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ANDREA L. BEAVER; FLOYD TURNER; MINELLE L. BATSON; MARY Y. BURNETT; MICHAEL L. SEYMOUR; TERRY L. BEAVER; ROBERT T. MURPHY; SHARON LYNN ATHERTON; ROGER BLOXHAM; STEVE GALPIN; RICHARD P. PRAWDZIENSKI; MICHAEL A. CLEM; WHITNEY L. BOUTIN, JR.; CHRISTOPHER S. POWELL; CHARLES A. BURRIS; and the LIBERTARIAN PARTY OF OKLAHOMA a/k/a Libertarian Political Organization,

Plaintiffs-Appellants,

v.

MICHAEL CLINGMAN, Secretary of the Oklahoma State Election Board; GLO HENLEY, Chairman of the Oklahoma State Election Board; KENNETH MONROE, Vice Chairman of the Oklahoma State

No. 03-6058

Election Board; THOMAS E. PRINCE, Member of the Oklahoma State Election Board; and the OKLAHOMA STATE ELECTION BOARD,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Oklahoma (D.C. No. CIV-00-1071-F)

James C. Linger, Tulsa, Oklahoma for Plaintiffs-Appellants.

Wellon B. Poe, Assistant Attorney General, Oklahoma City, Oklahoma for Defendants-Appellees.

Before **KELLY**, **LUCERO**, and **O'BRIEN**, Circuit Judges.

(Filed Apr. 6, 2004)

LUCERO, Circuit Judge.

This case presents issues at the intersection of two Supreme Court cases concerning the associational rights of political parties in the context of primary elections. Oklahoma's election statutes currently provide for a semi-closed primary system, in which a party may invite only its own party members and registered voters designated as Independents to vote in its primary. Along with registered voters of the Republican and Democratic parties, the Libertarian Party of Oklahoma (the "LPO") filed a § 1983

action, alleging that the Oklahoma election statutes regulating primaries violate their rights to freedom of political association and free speech by preventing the LPO from inviting members of other parties to vote in its primary elections.

The district court found the Oklahoma statutes to be constitutional. Because we conclude that the election laws impermissibly violate the LPO's associational rights, we exercise jurisdiction pursuant to 28 U.S.C. § 1291 and **REVERSE**.

I

Several types of primary systems exist in the United States.[1] Oklahoma's statute regarding primaries provides that:

> A. No registered voter shall be permitted to vote in any Primary Election or Runoff Primary Election of any political party except the political party of which his registration form

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[1] In a "closed primary," there is a separate primary ballot for each party, and no cross-over voting is allowed. In other words, a registered Republican can vote only in the Republican primary. A "semi-closed primary," which resembles the closed primary, permits a party to invite independents to vote in the party's primary if it so chooses. In an "open primary" system, all voters, regardless of party affiliation, are able to choose the primary in which they vote. Finally, a "blanket primary" system allows each voter to choose in which primary he or she will vote for each separate office. A "party-option open primary," which is at issue in this case, is a variation of the "open primary." In a party-option open primary, a party may choose either to open its primary to registered independents or voters from other parties or to restrict its primary to only voters of its own party.

> shows him to be a member, except as otherwise provided by this section.
>
> B.
>
> 1. A recognized political party may permit registered voters designated as Independents . . . to vote in a Primary Election or Runoff Primary Election of the party.

Okla. Stat. tit. 26, § 1-104. By the statute's terms, a political party in Oklahoma may allow Independents to vote in its primary and runoff elections, but a party may not invite voters registered with other parties to vote in its primary.

Having exercised its statutory option to allow Independents to vote in its primaries, the LPO would also like to invite all registered Oklahoma voters, regardless of their political affiliations, to participate. The LPO has decided that such an action would help it reach out to Libertarian-oriented voters of other political affiliations, thereby producing a more viable Libertarian candidate. The LPO initially asked the Secretary of the Oklahoma State Election Board for permission to invite all registered voters to participate in its primaries for the 2000 election cycle, and the Secretary denied the request. After announcing the same intention for the 2004 election cycle and being denied again, the LPO filed suit in federal district court. It claimed that the First Amendment's guarantee of free association gave it the right to invite all registered voters, regardless of political affiliation, to vote in its primaries; it sought a permanent injunction to enjoin the Oklahoma State Election Board from enforcing the state election statutes. If granted such an injunction, the

LPO suggested that Oklahoma would become a party-option open primary state, allowing each party the option of opening its primary to registered voters of other parties.

Finding that the LPO had standing to bring the suit, the district court proceeded to weigh the character and magnitude of the burden imposed on the LPO's rights protected by the First and Fourteenth Amendments against the interests set forth as justifications by the state. It concluded that the burden of the statute on the LPO was not a severe one and accordingly analyzed whether any of Oklahoma's proffered interests were sufficiently important to justify the burden. Though it found unavailing Oklahoma's interests in avoiding voter confusion, administrative difficulties, "swamping," and "raiding,"[2] the district court concluded that the state's interest in "preserving the political parties as viable and identifiable interest groups, insuring that the results of a primary election . . . accurately reflect the voting of the party members" (R. at 68-69) was sufficiently important for the state to prevail.

II

We review the district court's findings of fact for clear error. Fed.R.Civ.P. 52(a). "A finding is 'clearly erroneous'

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[2] Swamping is defined as the control of a minor party's candidate selection by voters affiliated with other parties; it was described by the Supreme Court in *California Democratic Party v. Jones*, 530 U.S. 567, 578 (2000). Raiding is similarly defined and gives non-members of a minor party the ability to overtake the minor party as a flag of convenience, thus affecting the ideology of the ticket representatives of the party. *Id.*

when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (citation omitted). Our review of questions of law, on the other hand, is de novo. *See Elder v. Holloway*, 510 U.S. 510, 516 (1994). "[T]he difference between a *de novo* review of a record and a review under the clearly erroneous standard is significant," *Ocelot Oil Corp. v. Sparrow Indus.*, 847 F.2d 1458, 1464 (10th Cir. 1988); in de novo review, "no form of appellate deference is acceptable," *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991).

A

Because Oklahoma statutes currently recognize the LPO as a political organization rather than a political party, we must first determine whether the LPO has standing to bring a suit to enjoin laws that restrict political parties. In Oklahoma, party status depends on statutory requirements; specifically, a group may attain party status during even-numbered years by getting a petition signed by five percent of the number of people who voted in the last general election. Okla. Stat. tit. 26, § 1-108. Having regularly completed these requirements in even-numbered years, the LPO has consistently and cyclically achieved party status. In order to *maintain* party status until the following election cycle, however, the party must achieve ten percent of the total votes cast for certain offices. Okla. Stat. tit. 26, § 1-109. If a party fails to achieve the required ten percent, it loses its status as a party and becomes a "political organization" until it is able to regain party status through the mechanisms described in § 1-108. Because the LPO has never achieved the

required ten percent, it consistently has lost its party status in years following elections. Therefore, over the last two decades, the LPO has managed to temporarily attain party status in the few months surrounding the elections but has not maintained it during the off years.

Our Article III standing jurisprudence requires that an actual controversy exist [sic] at all stages of litigation, and that the parties to the litigation all have a personal stake in its outcome. Because the LPO's status was that of a political organization rather than a political party when it brought the instant suit, there exists some doubt as to the LPO's standing to challenge a law that regulates political parties. As to the injury requirement, the LPO must demonstrate that the Oklahoma primary election statutes injure or threaten to injure the LPO. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The district court found that "[t]he LPO is an active organization with political plans for the 2004 election cycle." (R. at 23.) In addition, the LPO has been on the Oklahoma ballot in every presidential election from 1980 to 2000 and had primary elections in 1980, 1996, and 2000.

Moreover, we allow claims when plaintiffs contest "wrongs capable of repetition yet evading review." *See Rosario v. Rockefeller*, 410 U.S. 752, 756 n.5 (1973); *see also Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 514-515 (1911). One area in which the Supreme Court has applied this exception frequently is election law. In *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969), for example, the Court allowed plaintiffs to challenge a state law that required a certain number of signatures to place an independent candidate's name on the ballot. There, the Court concluded that the case was not moot because plaintiffs might be expected to seek similar access to the ballot in the future,

and thus the wrong was capable of repetition yet evading review.

Similarly, in *Norman v. Reed*, 502 U.S. 279 (1992), the Court allowed a plaintiff to challenge a ballot-access law. Explaining why it allowed the challenge despite the fact that the elections had already taken place, the Court stated that "[t]here would be every reason to expect the same parties to generate a similar, future controversy subject to identical time constraints if we should fail to resolve the constitutional issues that arose in 1990." *Id.; see also First National Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978) (allowing plaintiffs to challenge a law prohibiting corporations from spending money in elections because the issue would likely arise in future elections).

The injury of which the LPO complains is similarly capable of repetition yet evading review. Both of the necessary elements are present. With respect to the injury's tendency to evade review, as explained above, it has been impossible to this point for the LPO to maintain its party status for more than a period of a few months. Equally apparent is the likelihood that the injury will be repeated. Although the LPO was not a political party at the time of its suit, it has a consistent record of demonstrating the ability to achieve party status. Moreover, the LPO intends to petition to regain full political party status for the 2004 election cycle, and thus it is likely that there will be a primary election with various LPO candidates competing for the right to stand for election. Indeed, "[t]here would be every reason to expect the same parties to generate a similar, future controversy subject to identical time constraints if we should fail to resolve the constitutional issues." *Norman*, 502 U.S. at 288. Accordingly, we conclude that the LPO has standing to bring the instant suit.

B

Turning to the merits of the appeal, the LPO's claim requires us to consider the impact of the Oklahoma election laws upon its rights to free association and speech under the First and Fourteenth Amendments. To this end, we must balance the state's authority to regulate elections with the freedom of political parties to choose those with whom they will associate. The Constitution grants the states the power to legislate the "Times, Places, and Manner of holding Elections for Senators and Representatives," Art. I, § 4, cl. 1, and states have parallel control over state elections. However, this general power alone "does not justify, without more, the abridgment of fundamental rights, such as the right to vote, or, as here, the freedom of political association." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986) (citation omitted).

The nature of the constitutional rights at stake in the instant case is axiomatic; "[t]he freedom of association protected by the First and Fourteenth Amendments includes partisan political organization." *Id.* at 214; *see Elrod v. Burns*, 427 U.S. 347, 357 (1976) (plurality opinion); *Buckley v. Valeo*, 424 U.S. 1, 15 (1976). In this context, our conception of the freedom of association is not simply an acknowledgment that individuals should be free to join or not join a party. The associational rights of political parties are distinct; indeed, "[f]reedom of association means not only that an individual voter has the right to associate with the political party of her choice, but also that a political party has a right to identify the people who constitute the association." *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 229 (1989) (citations omitted).

More recently, the Supreme Court reiterated:

> In no area is the political association's right to exclude more important than in the process of selecting its nominee. That process often determines the party's positions on the most significant public policy issues of the day, and even when those positions are predetermined it is the nominee who becomes the party's ambassador to the general electorate in winning it over to the party's views. . . . [Thus we acknowledge] the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party select[s] a standard bearer who best represents the party's ideologies and preferences.

California Democratic Party v. Jones, 530 U.S. 567, 575 (2000) (citations omitted). Moreover, the Supreme Court has recognized that party "enrollment or public affiliation with the Party itself is merely one element in the continuum of participation in Party affairs, and need not be . . . the most important." *Tashjian*, 479 U.S. at 215. In accordance with this precedent, the LPO claims that the Oklahoma statutes burden its right to determine the bounds of its association in its quest for political success.

Having articulated the associational rights at stake, we must assess the degree of the burden imposed on those rights by the current Oklahoma election laws. To determine whether a state election law's burden on associational rights is impermissible:

> a court . . . must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Anderson v. Celebrezze, 460 U.S. 780, 789 (1983). More recently, the Supreme Court clarified that if the burden is severe, the regulation must be narrowly tailored and advance a compelling state interest; on the other hand, if we determine the burden to be less severe, then important regulatory interests are generally enough to justify the regulation. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358-59 (1997); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

We must therefore determine the magnitude of the burden that the Oklahoma statutes place on the LPO.[3] Of course, not every burden that state regulations impose on associational rights in the election law context is a severe one. *See, e.g., Burdick*, 504 U.S. at 432-34 (concluding that Hawaii's ban on write-in voting was not entitled to strict scrutiny). The Court has applied intermediate scrutiny, for

[3] This task is somewhat complicated by the fact that prior to *Burdick*, the Court had not specifically articulated the need for a court to base its analysis on whether the burden imposed by an election statute on constitutional rights was a "severe" one. Thus, many cases do not use that terminology. In such prior cases, however, the Court either generally was explicit in employing strict scrutiny or intermediate scrutiny to evaluate the burdens imposed by election statutes on associational rights. We thus rely on the type of scrutiny employed as a useful proxy for purposes of determining whether the Court viewed the particular burden as severe (if it applied strict scrutiny) or less substantial (if it used intermediate scrutiny).

example, when the law's restrictions were chiefly administrative. *See, e.g., Rosario*, 410 U.S. at 760-62 (employing intermediate scrutiny in evaluating a New York law that required voters to enroll in a political party by a cutoff date).

However, when states have statutorily restricted parties from defining the bounds of their own association, the Court has tended to employ strict scrutiny. *See, e.g., Jones*, 530 U.S. 567, 582 (2000); *Eu*, 489 U.S. 214, 225 (1989) (requiring California's election provisions prohibiting parties from endorsing candidates in primaries to be narrowly tailored to serve a compelling state interest); *Tashjian*, 479 U.S. at 225 (1986); *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 124 (1981) (applying strict scrutiny when Wisconsin attempted to force the Democratic Party to accept its system for selecting delegates to the national party convention); *Cousins v. Wigoda*, 419 U.S. 477, 489 (1975) (using strict scrutiny to analyze whether Illinois' interest in determining the delegates at its primaries trumped parties' associational rights); *but see Timmons*, 520 U.S. at 358-59 (employing intermediate scrutiny when analyzing Minnesota's prohibition of fusion candidacies).

Most instructive to our present analysis are *Tashjian* and *Jones;* the facts in the case before us place it squarely between those two cases. In *Tashjian*, the Court considered Connecticut's election statutes, which provided for an entirely closed primary system. *Tashjian*, 479 U.S. at 211. In other words, only voters registered with a particular party could vote in that party's primary; even independents could not vote in Connecticut's primaries. *Id.* Like the LPO in the instant case, the Republican Party in *Tashjian* asserted that Connecticut's election statutes violated its

First Amendment freedom of association rights by restricting it from inviting certain registered voters to assist it in selecting its standard-bearer. *Id.*

The Supreme Court explained that in order to trump the Republican Party's associational rights in this context, Connecticut's regulation would need to be narrowly tailored to advance a compelling interest. *Id.* at 217. Deciding that none of Connecticut's asserted interests met strict scrutiny, the Court held that a state could not restrict a party from inviting independent voters to participate in its primary election absent a compelling state interest.[4] *Id.* at 229.

Almost two decades later in *Jones*, the Court analyzed California's "blanket primary" system, in which parties were required to allow voters to choose the primaries in which they wanted to vote. *Jones*, 530 U.S. at 570. As directed by *Timmons*, the Court analyzed the burden imposed by the California regulations and concluded that it was severe. *Id.* at 581-82. Accordingly, it required California to demonstrate that its regulations were

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[4] Footnote 13 of *Tashjian* is relevant:

> Our holding today does not establish that state regulation of primary voting qualifications may never withstand challenge by a political party or its membership. A party seeking, for example, to open its primary to all voters, including members of other parties, would raise a different combination of considerations. Under such circumstances, the effect of one party's broadening of participation would threaten other parties with the disorganization effects which the statutes in *Storer v. Brown*, 415 U.S. 724 (1974), and *Rosario v. Rockefeller*, 410 U.S. 752 (1973), were designed to prevent.

479 U.S. at 224 n.13. This case poses such circumstances.

narrowly tailored to serve a compelling interest; concluding that none of the interests were sufficiently compelling, the Court held that California's primary system impermissibly violated parties' associational rights – more specifically, their ability to choose the group of people who selected their candidates. *Id.* at 586.

This case falls between *Tashjian* and *Jones*. Whereas *Tashjian* concluded that states could not restrict parties from allowing independent voters to vote in their primaries, and *Jones* held that states could not compel parties to allow voters from other parties to vote in their primaries, the instant case asks whether it is permissible for states to forbid parties from allowing registered voters from other parties to participate in their primaries.[5]

The similarities among *Tashjian*, *Jones*, and this case prove useful in our analysis, as they demonstrate that state regulations can impair associational rights either by compelling political association as in *Jones*, or by precluding political association as in *Tashjian*. More generally, in both cases the Supreme Court considered statutes that directly affected a political party's freedom to set the boundaries of the group of voters it would invite to help it

[5] One of our sister circuits had occasion to consider a question similar to the one before us. In *Cool Moose Party v. Rhode Island*, the First Circuit analyzed Rhode Island's election statute, which like Oklahoma's, provided for a semi-closed primary system. 183 F.3d 80, 82-83 (1st Cir. 1999). The First Circuit held that Rhode Island's semi-closed primary system impermissibly violated the associational rights of the Cool Moose Party. That case is somewhat distinguishable from the instant case, because Rhode Island apparently asserted only an interest in protecting the Cool Moose Party from raiding and swamping. Concluding that those interests did not trump the party's associational rights, the First Circuit held that Rhode Island's primary system was unconstitutional.

select its standard-bearer. To this end, the Court explained that a state generally may not "prevent the parties from taking internal steps affecting their own process for the selection of candidates." *Tashjian*, 479 U.S. at 224.

When read together, the clear and unavoidable implication of *Tashjian* and *Jones* is that a state generally may not restrict the ability of a political party to define the group of citizens that will choose its standard-bearer.[6] That conclusion dictates the terms of our present analysis, for among *Tashjian*, *Jones*, and the instant case runs a connecting thread. In each of the three cases, the regulation at issue restricted the options of parties seeking to define the scope of their associational rights. Faced with the prospect of such burdens in *Tashjian* and *Jones*, the Supreme Court employed strict scrutiny. Given the similarities among the cases, we are compelled to exercise similar vigilance here. Because we conclude that the burden in the instant case is a severe one, we proceed to analyze whether the regulations are narrowly tailored to serve a compelling state interest. *Jones*, 530 U.S. at 586.

Oklahoma sets forth the following four state interests in support of its current primary election statutes: (1) protecting the LPO from "swamping" and "raiding"; (2) preventing voter confusion; (3) minimizing administrative difficulties; and (4) promoting and protecting "the integrity of the election process," which includes "preserving the political parties as viable and identifiable interest groups,

[6] Analyzed in the context of related cases such as *Eu* and *La Follette*, moreover, it is apparent that the Court closely scrutinizes almost all state regulations that disrupt the decision making processes of the parties.

insuring that the results of a primary election . . . accurately reflect the voting of the party members, and prevention of confusion or misleading of the general electorate to the extent that the voting public often relies on party labels to make their choice." (R. at 68-69.)

With respect to Oklahoma's interest in protecting the LPO from "raiding" and "swamping," the Supreme Court has concluded that it is not for the state to determine what is in the best interests of a political party, explaining that "even if the State were correct, a State, or a court, may not constitutionally substitute its own judgment for that of the Party." *La Follette*, 450 U.S. at 122. Even though it employed only intermediate scrutiny in analyzing Oklahoma's interests, the district court in the instant case rejected the asserted interest of protecting the LPO. We agree that Oklahoma may not substitute its judgment for that of the LPO, and thus that its interest in protecting the LPO from itself is not sufficiently compelling to justify the burden on the LPO's associational rights.

As to Oklahoma's interests in avoiding voter confusion and administrative difficulties, whether such interests could ever be sufficiently compelling to justify a severe burden in any instance is a question that we need not decide. The district court found that on the record before it, the state had not offered sufficient facts to demonstrate even a substantial possibility of either confusion or administrative problems. With respect to voter confusion, it found that the LPO's exhibits clearly showed that "simple rules for voting eligibility can be posted at polling places when the primary and runoff elections are conducted," (R. at 75), thus eliminating the possibility of confusion. We owe deference to the district court on these findings of fact

nd conclude that the findings were not clearly erroneous. *See Anderson*, 470 U.S. at 573.

Regarding the specter of administrative problems raised by Oklahoma, the district court found that Oklahoma had introduced into the record "no basis for a finding that the implementation of a party-open primary system would create insuperable administrative burdens." (R. at 76.) We are unable to locate any evidence in the record that administrative difficulties would ensue under the LPO's proposed system; therefore, we conclude that the district court's finding that Oklahoma failed to show that administrative problems would occur if it implemented the LPO's proposed primary scheme was not clear error. *See Anderson*, 470 U.S. at 573.

Thus, we turn finally to Oklahoma's asserted interest in "protecting the integrity of the political process . . . [by] preserving the political parties as viable and identifiable interest groups, [and] insuring that the results of a primary election . . . accurately reflect the voting of the party members." (R. at 68-69.) This interest might be separated into two distinct interests – preserving political stability as a general matter, and protecting the non-LPO parties from the "poaching" of their voters by the LPO.

As to Oklahoma's general interest in political stability, the Supreme Court held in *Timmons* that though states may not "completely insulate the two-party system from minor parties' or independent candidates' competition and influence," 520 U.S. at 367, a state's interest in the stability of its political system is strong. In the ballot access context, moreover, the Court described a state's interest in political stability as "not only permissible, but compelling." *Storer v. Brown*, 415 U.S. 724, 736 (1974).

We grant that a state has a compelling interest in political stability as a general matter, but our task is to examine whether "*in the circumstances of this case*, [that interest is] compelling." *Jones*, 530 U.S. at 584. In *Jones*, for example, California asserted state interests in promoting fairness, affording voters greater choice, increasing voter participation, and protecting privacy. The Court recognized that theoretically, those interests might be compelling; however, it explained that the determination of whether they were compelling in any particular case was "not to be made in the abstract, by asking whether fairness, privacy, etc., are highly significant values; but rather by asking whether the *aspect* of fairness, privacy, etc., addressed by the law at issue is highly significant." *Id.*

In *Eu*, California asserted that its regulation forbidding parties from endorsing candidates was justified by its compelling state interest in political stability. Although conceding that a state's interest in political stability was compelling as a general matter, the Court held that California had not demonstrated that the interest was compelling in the circumstances of that case. It explained that "[m]aintaining a stable political system is, unquestionably, a compelling state interest. California, however, never adequately explains how banning parties from endorsing or opposing primary candidates advances that interest." *Eu*, 489 U.S. at 226 (citation omitted).

Our determination of whether Oklahoma's interest in political stability is sufficiently compelling in the instant case begins with the Supreme Court's comparison of the statute in *Storer*, 415 U.S. at 736, which considered a California statute forbidding a ballot position to an independent candidate who "had a registered affiliation with

[a] political party at any time within one year prior to the immediately preceding primary election," to Connecticut's closed primary system in *Tashjian*, the latter of which is much more closely analogous to the Oklahoma regulations at issue. The Court articulated:

> The statute in *Storer* was designed to protect the parties and the party system against the disorganizing effect of independent candidacies launched by unsuccessful putative party nominees. This protection [was] undertaken to prevent the disruption of the political parties from without, and not, as in this case, to prevent the parties from taking internal steps affecting their own process for the selection of candidates. . . . The Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution.

Tashjian, 479 U.S. at 224 (citation omitted).

On its face, the Court's language suggests that Oklahoma's interest in protecting the integrity of the political process is insufficiently compelling. After all, the regulation at issue here "prevent[s] the parties from taking internal steps affecting their own process for the selection of candidates." *Id.* However, *Tashjian* specifically disclaimed in footnote 13 that such a conclusion necessarily followed from its holding, suggesting that a case like the one before us would "raise a different combination of considerations . . . [by] threaten[ing] other parties with [] disorganization effects." *Tashjian*, 479 U.S. at 224 n.13.

We are mindful that footnote 13 of *Tashjian* counsels caution; in so proceeding, however, we ultimately conclude

that Oklahoma's interest on this record and in the circumstances of this case is not a compelling one. Finding the interest in protecting the integrity of the political process to be sufficiently important, the district court relied on evidence that close to twenty-four percent of Oklahoma's primaries were decided by a margin of five percent or less in 2000. (R. at 63.) Those numbers in hand, it hypothesized that the LPO's proposed party-option open primary might result in enough cross-over to change some election *results* and that the integrity of the political system would thereby be undermined. (*Id.*)

We acknowledge that the district court's hypothetical might come to fruition. To be sure, some election results might change if Oklahoma switches from a semi-closed primary system to a party-option open primary system. It may be the very possibility of such change that impels the litigation before us. What is less clear, and what Oklahoma fails to demonstrate, is why a few changed outcomes in tightly contested primaries would undermine the integrity of the political process, or how somewhat altered election results would diminish Oklahoma's political stability.

Relevant to our analysis of whether Oklahoma's interest in political stability is compelling under these circumstances is that the system urged by the LPO is already in place in two states. Specifically, Utah[7] and Alaska[8] currently employ a party-option open primary, and in neither state has there been a report of instability in

[7] *See* Utah Code Ann. § 20A-9-403.

[8] *See* Alaska Stat. § 15-25-010.

the political process. We grant that a state has a compelling interest in general political stability, but the fact that neither Utah nor Alaska has collapsed under the weight of its allegedly destabilizing primary system calls into question whether Oklahoma's interest in political stability is implicated under these circumstances.

In analyzing Oklahoma's asserted interest in political stability and viability of the political parties, the district court also seemed concerned with protecting the non-LPO parties from "poaching" by the LPO. In worrying about the impact upon the associational rights of the other Oklahoma parties of allowing the LPO to open its primary to registered members of those parties, the district court explained that Oklahoma's statutes were justifiable in part because they "bar a party from poaching another party's primary election voters." (R. at 82.)

It is true, as Oklahoma asserts, that at first blush this case appears to require us to consider both the associational rights of the LPO and those of the other parties in Oklahoma, each of which is virtually certain to be affected to some degree by a change in the statute. It would effect a strange result indeed to protect some associational rights at the direct expense of others, and if allowing the LPO to choose to invite members of the Republican and Democratic parties to vote in the LPO's primary election burdened the corresponding associational rights of the Republican and Democratic parties, this would be a different case.

Such an argument, however, reflects a fundamental misunderstanding of the freedom of association, which at its core protects against state regulations that: (1) preclude association, *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984); or (2) "force[] inclusion of an unwanted person

in a group," *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000). By finding protection against poaching of other parties' voters to justify the regulations at issue, the district court effectively would add a new associational right that has to this point been absent from constitutional discussion – the ability of a group to harness and control the associational opportunities of its members.

Parties may assuredly guard their associational rights against forced inclusion of unwanted people, *see, e.g., Jones;* such an option is readily available under the LPO's proposed alternatives, for parties may choose *not* to open their primary elections to members of other parties under a party-option open primary scheme. We cannot conclude, however, that the associational rights asserted by the LPO in this case are counterbalanced by any associational rights of parties seeking to restrict the associational opportunities of their registered members.

Moreover, any concern that the Republican and Democratic parties might have for losing voters to the LPO primary elections overlooks the countervailing consideration that allowing Oklahoma's voters additional choices in primary voting promotes the associational rights of the individual voters within those parties. In this regard, to allow the LPO to invite registered voters of other parties to participate in their primaries not only advances the associational interests of the members of the LPO, but it also allows voters the benefit of choosing a primary.

III

Absent a clearer demonstration of political instability than the one present in the record before us, we conclude

that Oklahoma's current election statutes are not narrowly tailored to advance a compelling state interest. Because Oklahoma's semi-closed primary scheme does not survive our strict scrutiny, we **REVERSE** the district court's denial of the LPO's request for a permanent injunction and **REMAND** for proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ANDREA L. BEAVER; et al., Plaintiffs,	)	
vs.	)	Case No. CIV-00-1071-F
MICHAEL CLINGMAN, Secretary of the Oklahoma State Election Board; et al., Defendants.	)	

MEMORANDUM OPINION

(Filed Jan. 24, 2003)

I.
Introduction

This case presents a challenge to important aspects of the process by which Oklahomans "bring forth those persons desired by their fellow citizens to govern." *Bullock v. Carter*, 405 U.S. 134, 148-49 (1972).

Plaintiff Andrea L. Beaver is a resident of Tulsa County and a registered Democratic voter in Tulsa County, Oklahoma.

Plaintiff Floyd Turner is a resident of Tulsa County and a registered Democratic voter in Tulsa County, Oklahoma.

Plaintiff Minelle L. Batson is a resident of Oklahoma County and a registered Democratic voter in Oklahoma County, Oklahoma.

Plaintiff Mary Y. Burnett is a resident of Rogers County and a registered Republican voter in Rogers Country [sic], Oklahoma.

Plaintiff Michael L. Seymour is a resident of Tulsa County and a registered Republican voter in Tulsa County, Oklahoma.

Plaintiff Terry L. Beaver is a resident of Tulsa County and a registered Republican voter in Tulsa County, Oklahoma.

Plaintiff Robert T. Murphy is a resident of Cleveland County, a registered Libertarian voter in Cleveland County, Oklahoma, is a candidate for the Libertarian nomination for United States Representative for the 5th District of Oklahoma, and is the chair of the Oklahoma Libertarian Party.

Plaintiff Sharon Lynn Atherton is a resident of Tulsa County and a registered Libertarian voter in Tulsa County, Oklahoma.

Plaintiff Roger Bloxham is a resident of Tulsa County, a registered Libertarian voter in Tulsa County, Oklahoma, was a candidate for the Libertarian nomination for Corporation Commissioner in Oklahoma's primary election conducted on August 22, 2000, and is the Libertarian nominee for Corporation Commission in the State of Oklahoma for the general election to be conducted on November 7, 2000.

Plaintiff Steve Galpin is a resident of Oklahoma County, a registered Libertarian voter in Oklahoma County, Oklahoma, and is the Libertarian Voter Registration and Ballot Access Coordinator for the State of Oklahoma.

Plaintiff Richard P. Prawdzienski is a resident of Oklahoma County, a registered Libertarian voter in Oklahoma County, Oklahoma, and was a candidate for the Libertarian nomination for Corporation Commissioner in Oklahoma's primary election conducted on August 22, 2000.

Plaintiff Michael A. Clem is a resident of Tulsa County, a registered Libertarian voter in Tulsa County, Oklahoma, and is a candidate for the Libertarian nomination for United States Representative from the 1st District of Oklahoma.

Plaintiff Whitney L. Boutin, Jr. is a resident of Cleveland County, a registered Libertarian voter in Cleveland County, Oklahoma, was the leading candidate for the Libertarian nomination for Corporation Commissioner in Oklahoma's primary election conducted on August 22, 2000. Plaintiff Boutin alleges that he withdrew from that candidacy in order to avoid a run-off election because all Oklahoma voters would not be permitted to vote in that run-off election and in order to save taxpayers money which would otherwise be expended on a run-off election which would not be conducted in the manner that the Libertarian Party of Oklahoma desired.

Plaintiff Christopher S. Powell is a resident of Oklahoma County, a registered Libertarian voter in Oklahoma County, Oklahoma, and is a candidate for the Libertarian nomination for the State House of Representatives in District 100.

Plaintiff Charles A. Burris is a resident of Tulsa County and a registered Libertarian voter in Tulsa County, Oklahoma.

Each of the individual plaintiffs are citizens of the State of Oklahoma and are registered voters of the State of Oklahoma who wished to vote in the LPO primary election in Oklahoma on August 22, 2000 and who wish to vote in any future LPO primary or run-off elections conducted in Oklahoma.

Plaintiff the Libertarian Party of Oklahoma (styled in the caption as "a/k/a Libertarian Political Organization") is, for reasons which are discussed below, not currently recognized in the State of Oklahoma as a political party. It is recognized in the statutory "political organization" category. The Libertarian Party of Oklahoma is sometimes referred to in this order as LPO.

Defendant Michael Clingman is the Secretary of the Oklahoma State Election Board. In that capacity, Secretary Clingman is responsible for administering the election and voter registration laws of the State of Oklahoma. Secretary Clingman has supervisory authority over all county election boards, has responsibility to promulgate, repeal or modify such rules or regulations as he deems necessary to achieve and maintain uniformity in the application, operation, and interpretation of state and federal election laws and to maximize correctness, impartiality, and efficiency in the administration of those election laws. Secretary Clingman is the chief state election official responsible for coordination of state responsibilities under the National Voter Registration Act of 1993.

Defendant Glo Henley is the chairman of the defendant Board.

Defendant Kenneth Monroe is the vice-chairman of the defendant Board.

Defendant Thomas E. Prince is a member of the defendant Board.

The defendant Board is a state board organized under the laws of the State of Oklahoma to operate and perform such duties as are prescribed by law for the purpose of overseeing elections conducted by the state.

Plaintiffs have brought this action under 42 U.S.C. § 1983 (and other statutes), alleging that certain Oklahoma election statutes violate plaintiffs' First and Fourteenth Amendment rights to freedom of political association and free speech. Specifically, plaintiffs challenge 27 O.S. § 1-104(A) and § 1-104(B)(4) as statutes which impermissibly prevent a recognized political party in Oklahoma from opening up its primary and run-off elections to all Oklahoma registered voters regardless of those voters' political party affiliation. Plaintiffs seek a judgment declaring these statutory provisions unconstitutional and request injunctive relief prohibiting defendants from enforcing these provisions. 28 U.S.C. § 2201, 2201.

Defendants assert that this action is moot and, on the merits, deny that plaintiffs are entitled to any declaratory or injunctive relief. The court has concluded, for the reasons which are set forth at length in this memorandum opinion, that this action is not moot. The court has also concluded that, although some of the justifications offered by the state for the existing primary election system are unpersuasive, the plaintiffs have not established that they are entitled, as a matter of constitutional right, to imposition of a party-option open primary election system in Oklahoma.

II.
Stipulated Facts[1]

The parties have stipulated that the following facts are true. Accordingly, the court finds the following stipulated facts (¶¶ 1-36), as drafted by the parties, to be established without further proof:

1. All parties are properly before the court.

2. All parties have been correctly designated.

3. Venue is proper in this court.

4. In the year 2000, the filing period for political party nominations in the State of Oklahoma was on July 10, 11, and 12, 2000.

5. In the year 2000, the filing deadline for contesting a political party's candidates in the State of Oklahoma was by July 14, 2000, at 5:00 p.m.

6. In the year 2000, the political party primary election in the State of Oklahoma was held on August 22, 2000. In-person absentee voting began August 17, 2000.

7. In the year 2000, the run-off election in the State of Oklahoma was held on September 19, 2000.

8. In the year 2000, the general election in the State of Oklahoma was held on November 7, 2000.

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[1] To the extent that any of the matters contained in the stipulation (or in the facts which are found by the court, in part III) are legal, rather than factual, the court regards them as conclusions of law. Some uncontested aspects of Oklahoma election law are recited in the stipulated facts (part II) and in the facts found by the court (part III). Those legal matters are treated as facts because they provide some of the factual backdrop for the contested legal issues.

9. At present, an Oklahoma voter may only register to vote as Republican, Democratic, Reform, Libertarian, or Independent.

10. Only Oklahoma voters registered as Republicans may vote in the Republican Party primary election. This is by designation of the Oklahoma Republican Party.

11. Only Oklahoma voters registered as Democratic may vote in the Democratic Party primary election. This is by designation of the Oklahoma Democratic Party.

12. The Reform Party has allowed Oklahoma voters who are registered as Reform or Independents to vote in the Reform Party primary election. This is by designation of the Oklahoma Reform Party. However, the Reform Party has never had a primary or run-off election contest in the State of Oklahoma.

13. The Libertarian Party, pursuant to Oklahoma statutes, allows Oklahoma voters who are registered as Libertarian or Independents to vote in the Libertarian Party primary election. This is by designation of the Oklahoma Libertarian Party. The Libertarian Party would like to allow all Oklahoma voters, regardless of their political affiliation, to vote in Libertarian Party primary elections.

14. On May 31, 2000, the Voter Registration and Ballot Access Coordinator for the Libertarians in the State of Oklahoma turned in a designation to the Secretary of the Oklahoma State Election Board notifying the Oklahoma State Election Board that the Libertarian Party of Oklahoma consented to voting by all registered Oklahoma voters – whether they were Libertarian, Independent, Republican, Democratic, or Reform – to

vote in the Libertarian primary and run-off elections in the State of Oklahoma for the year 2000.

15. On May 31, 2000, Lance Ward, then Secretary of the Oklahoma State Election Board, accepted the Libertarian Party of Oklahoma's request that Independents could vote in the Libertarian Party primary and run-off elections in the year 2000, but did not accept said designation from the Libertarian Party of Oklahoma as to permitting Republican, Democratic, Reform, or any other recognized political party or political association voters voting in the Libertarian Party primary and run-off elections for the State of Oklahoma for the year 2000.

16. On June 21, 2000, the Libertarian Party of Oklahoma was notified that it had achieved political party status in the State of Oklahoma pursuant to OKLA. STAT. tit. 26, § 1-108. Prior to June 21, 2000, the Libertarian Party of Oklahoma was recognized as a political organization pursuant to OKLA. STAT. tit. 26, § 1-109(B).

17. There were 141 registered Libertarian Party voters in the State of Oklahoma as of November 5, 1996.

18. In the year 1996, the Libertarian Party of Oklahoma permitted Independent voters to vote in the Libertarian primary election conducted on August 27, 1996. The total vote cast in the Libertarian primary election for United States Senator on August 27, 1996, was 2,940 votes. Since only Libertarians and Independents could vote in the Libertarian Party's primary, and since there were no more than 141 registered Libertarian Party voters, the vote in the Libertarian Party's primary election on August 27, 1996, for United States Senator, means that at least 95% of the voters casting votes in the aforesaid

Libertarian Party primary election were Independent voters.

19. There are currently more than 2,100 voting precincts in the State of Oklahoma. Pursuant to OKLA. STAT. tit. 26, §§ 2-123 and 1-128.1, each precinct must have a minimum of three officials working an election, totaling more and 6,300 precinct workers working each election.

20. Oklahoma statutes require that the Oklahoma Election Board provide training for all members and employees of each county election board every two years. In addition, each precinct official is to receive in-person training every two years. The training conducted by the State Election Board and each respective County Election Board for the 2000 election cycle has already been completed.

21. There were 360 registered Libertarian Party voters in the State of Oklahoma as of June 30, 2000.

22. In the year 2000, there was no political party primary election conducted for the Reform Party in Oklahoma.

23. In the year 2000, the only statewide political party primary election conducted in the State of Oklahoma on August 22, 2000, involved the Libertarian Party primary for Corporation Commissioner.

24. There were three candidates for the Libertarian nomination for Corporation Commissioner in Oklahoma at the primary election to be conducted on August 22, 2000, to-wit: Richard Prawdzinski of Edmond, Oklahoma; Whitney L. Bootin, Jr. of Norman, Oklahoma; and Roger Bloxham of Tulsa, Oklahoma.

25. There were no statewide primary elections for the Republican or Democratic parties of Oklahoma for the primary election held on August 22, 2000.

26. In the year 2000, the Republican Party held primary elections in the State of Oklahoma on August 22, 2000, for United States Representative for Districts 1, 2, 4, and 5, but not in Districts 3 and 6.

27. In the year 2000, the Democratic Party held primary elections in the State of Oklahoma on August 22, 2000, for United States Representative for Districts 1, 2, and 6, but not in Districts 3, 4, and 5.

28. There were several primary and runoff elections conducted by the Republican and Democratic parties in various State Senate and State House of Representative districts in Oklahoma in 2000 as well as local county and municipal races.

29. Preparation and setup for the 2000 primary election ballots began on July 13. Lance Ward, then Secretary of the Oklahoma State Election Board, expected ballot proofing to begin no later than July 18 and ballot printing for the 2000 primary to begin no later than July 20.

30. The Libertarian Party of Oklahoma has passed By-laws and Resolutions which permit all registered Oklahoma voters – whether they be Republican, Democratic, Reform, Independent, or Libertarian – to vote in any primary or run-off election conducted by the Libertarian Party in any election in the year 2000 or in any future primary or run-off election conducted in the State of Oklahoma.

31. If the Libertarian Party of Oklahoma were allowed to open its primary election to all voters at the individual voters choice, each voter would only be able to receive one ballot selection in order to cast his or her vote.

32. The Libertarian Party of Oklahoma has been on the Oklahoma ballot in every presidential election from 1980 through 2000, and has had primary elections in 1980, 1996, and 2000.

33. There were 770 registered Libertarian voters in the State of Oklahoma as of January 15, 2001.

34. The Libertarian Party of Oklahoma is currently recognized as a political organization in the State of Oklahoma pursuant to OKLA. STAT. tit. 26, § 1-109(B).

35. There were 286 registered Libertarian voters in the State of Oklahoma as of November 1, 2002.

36. In the year 2004, the primary election will be held on August 24, 2004, the run-off election will be held on September 21, 2004, and the general election will be held on November 2, 2004.

The parties also stipulated that the following factual matters, though not admitted, would not be contested at the trial:

37. The Libertarian Party of Oklahoma feels that it would be advantageous to it as a political party and important to its members and all voters of Oklahoma if their rights to political association and political speech pursuant to the First and Fourteenth Amendments to the United States Constitution were furthered by opening up

the Libertarian Party primary and run-off elections to all Oklahoma voters regardless of political affiliation.

38. The Libertarian Party of Oklahoma and its members feel that opening up of the Libertarian Party of Oklahoma's primary and run-off elections would help them reach out to Libertarian oriented voters of other political affiliations, produce a more viable Libertarian candidate for the general election, create favorable publicity for the Libertarian Party, and encourage further expansion and growth of the Libertarian philosophy. It has also been the experience of most Libertarians that many individuals not formally affiliated with the Libertarian Party share Libertarian views on certain issues so as to support the advancement of common political objectives favored by the Libertarians.

39. There are a number of voters in the State of Oklahoma who are registered in political parties other than the Libertarian Party who wished to vote in the Libertarian Party's primary and run-off elections in the State of Oklahoma in the year 2000 and wish to vote in future primary and run-off elections to be conducted by the Libertarian Party.

40. The Libertarian Party of Oklahoma intends to seek political party recognition in the State of Oklahoma, pursuant to OKLA. STAT. tit. 26, § 1-108, and run candidates for elective office in the election to be conducted in Oklahoma in the year 2004.

41. There are a number of Libertarians who are interested in running in Libertarian Primaries to be conducted in the State of Oklahoma in the year 2004. Among these individuals are Roger Bloxham, Lynn Atherton, and Robert Murphy, all of whom desire to seek the

Libertarian nomination for U.S. Senator from Oklahoma in the year 2004.

III.
Additional Findings

On the basis of the evidence before it, the court makes the following additional findings of fact:

1. The factual matters set forth in ¶¶ 37-41 in part II, above, to which the parties do not stipulate but which were not contested at trial, are well supported by the evidence and are accordingly found by the court to be true.

2. The Libertarian Party has been an active and energetic, albeit largely unsuccessful participant in Oklahoma politics for more than 20 years. As is set forth elsewhere in the court's findings, at various times, the Libertarian Party has enjoyed official statutory party status. At other times, the status of the Libertarian Party has receded to that of a political organization.

3. In 1980, the Libertarian Party attained full party status (e.g., statutory political party status) for the first time. Once a party attains recognized political party status, it must satisfy statutory requirements in order to retain that recognition and thus to retain its place on the ballot. Specifically, a recognized political party whose nominee for governor or nominees for electors for president and vice-president (as the case may be) fail to receive at least 10% of the total votes cast for those offices at a general election will loose its status as a recognized political party. The erstwhile political party becomes a statutory political organization. Oklahoma law provides (26 O.S. § 1-109) that status as a political organization will

terminate four years after the date that the political party ceases to be recognized or when the political organization regains recognition as a political party (whichever is earlier). The 10% retention requirement is a significant hurdle for minor party ballot access in Oklahoma.

4. The Libertarian Party has lost its recognized status by virtue of its failure to satisfy the retention requirement set forth in Oklahoma law, as applied to the 2000 election cycle.[2] The Libertarian Party intends to regain full political party status for the 2004 election cycle. Several Libertarian Party candidates plan to run for United States Senate in 2004, making it likely that there will be a primary election with various Libertarian Party candidates competing for the right to stand for election to the United States Senate in the November, 2004 general election.

5. Although the Libertarian Party has not participated in every primary election and has not fielded candidates for all offices in any primary election, the Libertarian Party has been a fairly consistent participant in Oklahoma's primary elections. Robert T. Murphy, who has been active in Libertarian Party politics, has been a Libertarian Party candidate for elective office several times. He ran for United States Senate in 1980 and 1984 as a Libertarian candidate. He ran as a candidate for Congress in 2000. (It was not necessary for Mr. Murphy to run in a primary election in those three elections.) Mr. Murphy intends to run for United States Senate in 2004.

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[2] For a full description of Oklahoma's ballot retention requirements, see *Coalition for Free and Open Elections v. McElderry*, 48 F.3d 493, at 495-96 (10th Cir. 1995).

Mr. Murphy wishes to have Republicans and Democrats eligible to vote at the primary election stage of his intended 2004 effort to win a United States Senate seat.

6. A Libertarian Party primary election for the United States Senate seat is likely in 2004.

7. In 2000, Richard Prawdzienski ran for Oklahoma Corporation Commissioner as a Libertarian Party candidate. In that election, the Libertarian Party allowed independent candidates to vote in its primary.

8. Floyd Turner, an Oklahoma resident and registered Democrat desired to vote in the Libertarian primary election for Oklahoma Corporation Commissioner in the 2000 election cycle. Of course, the law precluded him from doing so. Mr. Turner does not intend to relinquish his status as a registered Democrat in order to avail himself of the opportunity to vote in the Libertarian primary.

9. The court finds, on the basis of the LPO's consistent record of political activity in Oklahoma and on the basis of the uncontroverted testimony with respect to the plans of the LPO and of the individuals who plan to run as Libertarian candidates, that it is likely that the LPO will once again regain recognized party status and will, accordingly, participate in the 2004 election cycle. The court further finds that it is likely that there will be competition among Libertarian candidates for office which will necessitate a primary election for the Libertarian Party. The court accordingly finds that it is likely that the issues which are presented by the LPO's expressed intent to invite voters affiliated with other parties to participate in its primary are likely to recur in the 2004 election cycle.

10. Compared to other states, it is relatively easy, in Oklahoma, for an independent candidate for public office to gain access to the ballot but relatively difficult for a political party to establish and maintain party status (with resultant ballot access).

11. There are at least four types of primary elections in the United States (perhaps with some variations within these general species). The four general types of political primary may be referred to as the closed primary, the semi-closed primary, the open primary and the blanket primary. In the closed primary election system, there is a separate primary ballot for each party. No crossover voting is allowed. In the semi-closed primary system,[1] there is a separate primary ballot for each party, but independents are permitted to vote in a primary election if the party chooses to permit voting by independents. In the open primary system, all voters may, regardless of registration or party affiliation, choose the primary in which they will vote in that primary election. In the blanket primary system, each voter can choose which primary he or she will vote in for each separate office. Within this nomenclature,[1] Oklahoma has a semi-closed primary. The primary election format to which the plaintiffs assert they are constitutionally entitled will be referred to as the party-option open primary.

12. A party-option open primary can help a minor party get established, at least in a broad electoral sense. Nationally, there are 23 states which effectively have open

[1] There are, of course, variations within these categories. For instance, a nominally closed primary system may not be very exclusive in practice if registered party affiliation can easily be changed before the primary election.

primaries. Utah, Alaska and Rhode Island (Rhode Island by virtue of the decision in *Cool Moose Party v. State of Rhode Island,* 183 F.3d 80 (1st Cir. 1999)) are the only states which have party-option open primaries.

13. In the 23 open primary states, there were 41 Libertarian primary elections between 1976 and 2002. In 40 of the 41 Libertarian primary elections, the Libertarian candidates garnered 1% or less of the total votes cast in the primary.

14. In 2002, the Utah Democratic[4] Party opened its contested primary in the First Congressional District to members of all parties. Even though the Democrats have only about 20% of party registration in Utah, 24% of the voters chose to vote in the Democratic primary. Thus, Democrats attracted a fair number of Republicans and Independents. This is an example of the base-broadening effect which the LPO seeks to establish in Oklahoma.

15. It is the political judgment of the Libertarian Party of Oklahoma that the advantages of a party-option open primary outweigh the disadvantages of that format. The Libertarian Party has no plans to change its bylaws in this respect.

16. It is plaintiffs' position that the Libertarian Party is entitled, as a matter of constitutional right, to declare its primary open or closed and to make the same choice with respect to any runoff election which may ensue. In turn, a voter who accepted the invitation to cross

[4] At trial, it was suggested that the official name of the Utah Democratic Party is the Utah Democrat Party. The readily available reference sources do not confirm this. *See* www.utdemocrats.org.

over in the primary would be afforded the same choice at the runoff stage, as long as the party in whose runoff he elected to vote had opted to open its primary.

17. In an open primary, the candidates must appeal to the voters of all parties. Plaintiffs' political science expert, Richard Winger, acknowledged that voters in an open primary are, in the aggregate, less likely than they would be in a closed primary to support the ideals of the parties in whose primaries they choose to vote on primary election day.

18. The defendant, Michael Clingman, Secretary of the Oklahoma State Election Board since August, 2001, testified that voter confusion and "raiding" would result from a party-option open primary system. Voter confusion would result from the application of varying rules on primary election day, depending upon the choices made by the parties as to whether to open their primaries. According to Mr. Clingman, the raiding phenomenon, which would occur with a party-option open primary, would put one party in a position to affect the choice of the candidates of another party.[5] Under Oklahoma election law, a

[5] Mr. Clingman's definition of raiding coincides with Justice Stewart's. *Rosario v. Rockefeller,* 410 U.S. 752, 760 (1973). Raiding has also been described as "malicious crossover voting." *California Democratic Party v. Jones,* 530 U.S. 567, 579 (2000). The reality of raiding as a phenomenon existing other than in the minds of supporters of closed primaries is a matter of conjecture. The Supreme Court has noted that the existence of raiding as an electoral phenomenon has never been conclusively proven. *Democratic Party of U.S. v. LaFollette,* 450 U.S. 107, 122, n. 23 (1981). However, as conjectural as raiding, in the strict sense, may be, it can be taken for granted that crossover voting can have noticeable effects. In Wisconsin's open Democratic presidential primary in 1964, 26 % of the votes were cast by crossover voters. Seven percent of Democratic voters voted for Alabama Governor George C.

(Continued on following page)

political party cannot determine what individuals will file for office under its banner. Thus, with the phenomenon of raiding, Mr. Clingman suggests that a party-option open primary would give non-members of a minor party the ability to overtake the minor party as a flag of convenience, thus affecting the ideology of the ticket representatives of the party. In this sense, crossover voting would, Mr. Clingman suggests, dilute party identity and impair party identification.

19. Lance Ward, the former Secretary of the Oklahoma State Election Board (having served in that capacity for 13 years) also expressed concern about the voter confusion which he asserts would result from a party-option open primary. Mr. Ward believes that the potential for confusion resulting from differences between parties in any given election would be compounded by differences in treatment of voters from one election to the next.

20. The legislation permitting registered Independents to vote in primary elections was enacted in 1987 (presumably in the wake of the *Tashjian* decision in 1986), but was first implemented in the 1996 general election. Mr. Ward confirmed that this was a relatively simple change to implement.

21. Mr. Ward suggested that the potential for voter confusion would be maximized if a party opted to open its primary but close its runoff. He raised the possibility that this system could result in the casting of a number of

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Wallace, but 62 % of crossovers voted for him. *Id.* at 118, n. 19. Open primary advocates have gone so far as to identify a category of crossovers who are "principled crossovers," *id.* at 124, n. 27, a categorization which requires remarkable powers of discernment.

irregular ballots sufficient to make the outcome of a primary election mathematically uncertain. As described by Mr. Ward, this problem results from changing the ballots voters get from election to election, perhaps within a three week period (between a primary and a runoff primary).

22. The court is not persuaded that significant voter confusion would result from a party-option open primary. As indicated by plaintiffs' exhibits 1 and 2, very simple rules for voting eligibility can be posted at polling places when the primary and runoff elections are conducted.

23. In *Atherton v. Ward,* 22 F.Supp.2d 1265 (W.D. Okla. 1998), the Libertarians sued the State Election Board for the purpose of establishing a right to register as Libertarians even though the LPO was not then a recognized political party in Oklahoma. The defendants predicted that if the Libertarians were granted the relief they sought, the result would be administrative problems amounting to a "parade of horrors," in Judge Alley's words. 22 F.Supp.2d 1268. At the trial of the case at bar, Lance Ward, the lead defendant in *Atherton,* could offer no evidence that his predictions, in *Atherton,* of administrative problems had come true. Likewise, Mr. Ward could not cite any instance, from any of the states which have party-option open primaries, in which difficulties were encountered in informing the voters as to which parties' primary elections and which parties' primaries were closed. This court finds in this case, as did Judge Alley in *Atherton,* that the granting of the relief sought by the plaintiffs would not result in any substantial, let alone insuperable, administrative burden.

24. The extent to which crossover voting (e.g., Republicans and Democrats voting in the Libertarian primary) would occur if Oklahoma had a party-option open primary is highly speculative. For the same reason, the effect of that crossover voting on the "donor" parties is a highly speculative matter.

25. Mr. Clingman asserts, in substance, that the state has an interest in seeing to it that the parties' candidate selections are the result of the choices of persons of like ideology and that, under the Oklahoma election scheme, the safety valve is the ease with which a candidate can run as an independent.

26. Mr. Ward also cited as an evil resulting from a party-option open primary system the possibility that major party candidates might tailor their positions to attract voters who might otherwise abandon their party's primary. Another evil which would result from a party-option open primary system, according to Mr. Ward, is "swamping." Swamping is the control of a minor party's candidate selection by voters affiliated with other parties. The phenomenon of swamping was vividly described by the Supreme Court in *California Democratic Party v. Jones*, 530 U.S. 567, 578 (2000), where the Court noted that, in California's blanket primary, the total number of votes cast for party candidates in some races was more than double the total number of registered party members.

27. Because of Oklahoma's liberal filing rules, the state's professed concern for protection of the political identities of the parties is not fully expressed in Oklahoma's election rules. For instance, in the 2002 election in Oklahoma's third district, no Democrat filed against the Republican incumbent. Consequently, at the end of the

filing period, a radical left wing or right wing candidate could have filed for Congress as a Democrat (assuming he had registered as a Democrat before the deadline; see 26 O.S. 2001 § 5-105), conferring upon himself status as the Democratic Party standard bearer.

28. In terms of the precise issues in this case relating to the effect of implementation of a party-option open primary in Oklahoma, the expert testimony was both highly interesting and highly speculative, although both of the retained experts ventured some opinions that were plausible, at least in the sense that they were not counter-intuitive. The experts also testified to some historical facts which were informative for this court and which may likewise be informative for a reviewing court. In addition to the testimony of their retained expert, the defendants presented expert testimony from Lance Ward, a former Secretary of the State Election Board, and from the defendant Michael Clingman, the current Secretary.

29. The opinions of Richard Winger, called by the plaintiffs, are summarized in defendants' exhibit 12. The opinions of Dr. Robert Darcy, called on behalf of the defendants, are summarized in defendants' exhibit 8. Mr. Winger and Dr. Darcy were well-qualified to address the matters which they addressed as expert witnesses.

30. Elsewhere in this Memorandum Opinion, the court discusses the issues and contentions which are essentially irrelevant to the court's disposition of this case and has likewise discussed those matters which are decisive. In light of the court's parsing of the issues, point-by-point resolution of the conflicts in the expert testimony is not necessary.

31. Although the court relies principally upon the affidavit of Richard Winger and on the transcript of his trial testimony as a record of the theories he expounded in this case, some aspects of his testimony deserve comment here. Mr. Winger testified persuasively that, under Oklahoma's ballot access rules, it is relatively difficult for minor parties to get established in Oklahoma politics. He pointed out that no Libertarian or member of any other minor party has been elected to any Oklahoma public office in more than 25 years and that, in more than 25 years, no minor party has had more than two years and five months of continuous legal recognition. This, of course, has consequences with respect to party membership. Party membership is, for instance, much higher in Kansas, where the Libertarian Party has been able to maintain its recognized status continuously.

32. Mr. Winger also testified persuasively that opportunistic candidacies, by candidates who do not share a party's ideology but join the party so that they can get on the ballot, are relatively unlikely in Oklahoma because, in Oklahoma, it is quite easy for independent candidates (for offices other than president) to get on the ballot. They simply need to pay the filing fee. For that reason, it is significantly less likely in Oklahoma that opportunistic candidacies, with resultant electoral raiding, will occur.

33. Mr. Winger also described in some detail the differences between Oklahoma law and California law with respect to independent candidacies and ballot access for minor parties. In California, according to Mr. Winger, it is much easier for minor parties to gain ballot access and much more difficult for independent candidates to run for public office. On this basis, Mr. Winger explained in

understandable terms the reasons for which the Libertarians' strategy in Oklahoma, with respect to the party-option open primary, is markedly different from the Libertarians' strategy in California (as demonstrated by the opinion in *California Democratic Party v. Jones*).

34. Dr. Robert Darcy, defendants' academic expert, opined that swamping has already occurred in Oklahoma in that independent voters have vastly outnumbered registered Libertarians in the Libertarian primaries. Dr. Darcy is also of the opinion that permitting Republicans and Democrats to vote in the Libertarian primary would diminish if not destroy the Libertarians' control of selection of their own political candidates. He estimated that 2-4% of Republican and Democratic voters would opt to vote in the Libertarian primary. He also opined that opening the Libertarian primary to Republican and Democratic voters would have an effect on the primaries from which the crossover voters were lured.

35. Thus, according to Dr. Darcy, modification of Oklahoma's primary election structure, which is presently designed to eliminate swamping and raiding, would have an effect on the group from which the crossover voters came as well as the group which they joined. The effect on the forsaken party's primary would depend upon the closeness of the primary, the nature of the race and the voting characteristics of the crossover group of voters. These matters are, of course, highly speculative.

36. Dr. Darcy offered some predictions as to how some registered Republicans and Democrats might behave as voters if offered the opportunity to vote in the Libertarian primary while retaining their Republican or Democratic registration. One of the major premises underlying

Dr. Darcy's testimony was that the Libertarian primary elections would likely become essentially meaningless by virtue of the numbers of Republicans and Democrats who might cross over to vote in a Libertarian primary if invited to do so. The impact of these prognostications is substantially reduced, however, by the fact that, under Oklahoma election law, all registered Libertarians are purged from the voter rolls as Libertarians when the Libertarian Party, as it typically does, forfeits its recognized party status following the presidential election cycle. Thus, it is highly likely that the ranks of independents and, indeed, of registered Republicans and Democrats, contain numerous voters who sympathize with the LPO but who simply do not wish to go through the motions of re-registering every time they are purged from the rolls.

37. Of course, the focal point of the experts on both sides was the question of the effect, in Oklahoma, of implementation of a party-option open primary in which the LPO would opt to invite voters affiliated with other parties to vote in the Libertarian primary. This is a scenario which has not occurred in Oklahoma. Consequently, the experts' predictions are based entirely upon their assumptions and hypotheses. As has been noted, the experts' opinions as to the effect of implementation of a party-option open primary are speculative. Some well-designed and undoubtedly very expensive exit polling would have reduced the speculativeness of the experts' predictions. However, in light of the court's conclusions as to the dispositive legal issues in this case, there was and is no real need for detailed predictions, with a high degree of certainty, as to the practical effect of implementation of a party-option open primary. As has also been noted, some of the historical facts which have been cited by the experts

are of interest and are, of course, more reliable than predictions as to future voter behavior. One notable example is the fact, testified to by Dr. Darcy and shown by his report, that, in the August, 2000 primary election in Oklahoma, nearly 24% of the races were decided by a margin of 5% or less. Dr. Darcy also testified that the 2002 primary election results, in terms of closeness of the margins of victory, were essentially the same. This suggests to the court, and the court finds, that the institution of a party-option open primary format in Oklahoma as sought by the plaintiffs would likely affect the outcome of some primary elections. Viewing the matter from the perspective of the minor parties, the evidence does not persuade the court that the presumed evils of raiding and swamping would be highly likely to occur. Raiding and swamping are phenomena which, in the classic examples, affect the minor party which chooses to open its primary to voters affiliated with other parties. On the other hand, the historical information which is in hand with respect to the number of very close major party primary races in Oklahoma indicates convincingly that, at the margin, implementation of a party-option open primary system would affect Oklahoma primary elections in a way not permitted or intended by the system currently in place.

IV.
Conclusions of Law

A. Preliminary Matters.

1. Mootness.

The LPO is an active organization with political plans for the 2004 election cycle. It is likely that LPO candidates will vie for the Libertarian nomination for United States

Senate, and perhaps for other offices, in the 2004 cycle. This is a controversy which is capable of repetition yet evading review. Therefore, this case is not moot. *See Democratic Party of the United States v. Wisconsin,* 450 U.S. 107, 115, n.13; *Storer v. Brown,* 415 U.S. 724, 737, n.8 (1974); *American Party of Texas v. White,* 415 U.S. 767, 770, n.1; all quoting or citing *Rosario v. Rockefeller,* 410 U.S. 752, 756, n.5 (1973).

2. Standard of Review.

Constitutional challenges to specific provisions of a state's election laws . . . cannot be resolved by any litmus-paper test to separate valid from invalid restrictions. *Tashjian v. Republican Party of Connecticut,* 479 U.S. 208, 213 (1986) (quoting the rule from *Anderson v. Celebrezze,* 460 U.S. 780, 789 (1983), in turn quoting *Storer v. Brown,* 415 U.S. 724, 730 (1974)).

A court must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the state as justifications for the burden imposed by its rule. In passing judgment, the court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. *Tashjian,* 479 U.S. at 214 (quoting *Anderson,* 460 U.S. at 789).

Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less

exacting review, and a state's important regulatory interests will usually be enough to justify reasonable nondiscriminatory restrictions. *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 358 (1997) Nor are elaborate, empirical verifications of the weightiness of the state's asserted justifications required. *Id.* at 364.

The mere fact that a state's system creates barriers tending to limit the field of candidates from which voters might choose does not of itself compel close scrutiny. *Burdick v. Takushi,* 504 U.S. 428, 433 (1992) (quoting *Bullock v. Carter,* 405 U.S. 134 (1972). When rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance. But when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the states' important regulatory interests are generally sufficient to justify the restrictions. *Burdick v. Takushi,* 504 U.S. 428, 434 (1992) (quoting *Anderson,* 460 U.S. at 788; applying this balancing standard to evaluation of Hawaii's ban on write-in ballots).

Faced with the inherent tension between a political party's right of association and a state's power to regulate elections, the Supreme Court has endorsed a flexible standard of review. *Cool Moose Party v. State of Rhode Island,* 183 F.3d 80, 82 (1999).

There must be more than a minimal infringement on the rights to vote and of association before strict judicial review is warranted. *Nader v. Schaffer,* 417 F.Supp. 837, 849 (1976), *aff'd* 429 U.S. 989 (1976) (upholding, as reasonably related to accomplishment of legitimate state goals, Connecticut statute providing that no person may

vote in a party primary unless the voter is on the last-completed enrollment list of that party).

These rules are succinctly summarized in "Elections-Nominations and Primary Elections: The Supreme Court Finds that California's 'Blanket Primary' Violates Political Parties' First Amendment Right of Association," 77 N.D. L. Rev. 827, 830 (2001), as follows:

> "The Supreme Court has developed a test to be used when determining whether an election law infringes upon a political party's First Amendment right of freedom of association. When determining the constitutionality of a state election law, a court has to weigh the character and magnitude of the burden imposed on the rights protected by the First and Fourteenth Amendments with the interests set forth as justifications by the state. A court has to consider the extent to which the state's interests made the burden necessary. The level of review depends on the weight of the burden: if the burden is severe, the regulation must be narrowly tailored and advance a compelling state interest, but if it is a lesser burden, important regulatory interests will generally be enough to justify reasonable, nondiscriminatory restrictions."

(Quotations and citations omitted.)

The following Tenth Circuit authorities are also helpful to the court's understanding of the standard by which it evaluates plaintiffs' challenge to Oklahoma's election statutes. *Campbell v. Davidson*, 233 F.3d 1229, 1233 (2000) (applying the "flexible standard of *Burdick*" to find that Colorado's election law requirement that unaffiliated candidates must be registered to vote was not a valid exercise of the state's regulatory power); *Campbell v.*

Buckley, 203 F.3d 738, 742-46 (10th Cir. 2000) (including an informative discussion and determining that the "flexible approach" referred to as "the balancing test," rather than the strict scrutiny test, applied to a [sic] evaluate an unsuccessful challenge to Colorado's ballot initiative law); and *Coalition for Free and Open Elections, Prohibition Party v. McElderry*, 48 F.3d 493, 496-97 (10th Cir. 1995) (applying the "balancing test" to determine an unsuccessful challenge to the validity of an Oklahoma statute which banned write-in voting in presidential and vice-presidential elections).[6]

B. The Merits.

As is discussed above, the court must first consider the character and magnitude of the asserted injury to the plaintiffs' First and Fourteenth Amendment associational rights. The court is then required to identify and evaluate the justifications put forward by the state for the burdens complained of. The court will generally discuss the

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[6] *Cf. Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989), a case in which the Supreme Court characterized the challenged California statutes (which banned primary endorsements and imposed restrictions on internal policy governance of political parties) as statutes which "directly [affect] speech which is at the core of our electoral process and of the First Amendment freedoms." *Id.* at 222-23. In *Eu*, the Court stated that the challenged law survived constitutional scrutiny only if the state showed that the law advanced a compelling state interest and that the statute was narrowly tailed [sic] to serve that interest. *Id.* at 222. *Eu* is distinguishable from this action. Not only are the restrictions challenged here much less burdensome than the ban challenged in *Eu*, that case measured citizens' and political parties' First Amendment interests against the state's regulatory interest; it did not measure *competing* First Amendment interests as the court must do here.

asserted injury and the proffered justifications, following which the court will analyze the matter in more detail.

1. Nature of the Asserted Injury.

The plaintiffs in this action include the LPO, as well as individuals registered as Republicans, Democrats or Libertarians. Plaintiffs assert that they "are pro-choice as to the choice to be made by political parties and individual voters on voting in political parties' primary elections. . . ." Plaintiffs' Amended Trial Brief, at 11. Going one step further than *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), and consistently with *Cool Moose Party v. State of Rhode Island*, 183 F.3d 80 (1st Cir. 1999), plaintiffs assert that Oklahoma's semi-closed primary election system unconstitutionally burdens their freedom to associate with others to advance their political beliefs. *Id.* at 12. Plaintiffs' claim is elegantly simple and facially appealing. The LPO and the Libertarians assert that they should be able to invite registered Republicans and Democrats into their primary if they choose to do so. The Republican and Democratic plaintiffs correspondingly assert that they should have the option to vote in the Libertarian primary if invited to do so. Accordingly, plaintiffs assert that Oklahoma's semi-closed primary system violates their "constitutional rights to political association and free speech." *Id.* at 17.

There is no room for doubt that the "freedom of association protected by the First and Fourteenth Amendments includes partisan political organization." *Tashjian* at 214. The First Amendment interests which are at stake here are made all the more important by the fact that the primary election is a crucial stage in biennial cycle of

political activity in Oklahoma; hence, the rights of the parties mean little if they are not protected at the primary election stage. *Tashjian* at 216. The decisions of the Supreme Court "vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party selects a standard bearer who best represents the party's ideologies and preferences." *Jones*, at 575 (internal quotation marks omitted).

This case, of course, involves a dimension which the Supreme Court noted was absent in *Tashjian*. The competing interests in the case at bar are not just those of the party and the state. We have, instead, the "different combination of considerations" which is raised by the assertion that the court should compel the state to permit the LPO to open its primary to voters affiliated with other parties as well as to independents. *Tashjian* at 224, n. 13.

2. Justifications Asserted by the State.

The defendants assert that imposition of a party-option open primary format in Oklahoma would result in voter confusion and that the resultant crossover voting would adversely affect the other parties' primaries, with possible effects on the outcome of the other parties' primary races. Amended and Supplemental Trial Brief of Defendants, at 6-7. Elaborating on its arguments, the state asserts that it has an interest in "protecting the integrity of the election process" and that that protection includes "preserving the political parties as viable and identifiable interest groups, insuring that the results of a primary election . . . accurately reflect the voting of the

party members and prevent[ion][of] confusion or misleading of the general electorate to the extent that the voting public often relies on party labels to make their choice." *Id.* at 10. In a display of gallantry not often found in modern day litigation, the state also argues at length that the LPO should lose this lawsuit for its own good. *Id.* at 11-13. The adverse effects from which the state says the LPO must be protected are swamping and raiding, as discussed above.

3. Analysis.

(a) Preliminary discussion.

In *Tashjian,* the Supreme Court held that the party's right to define its associational boundaries were impermissibly infringed by the state's prohibition on participation in the party's primary election by unaffiliated voters. *Tashjian* at 225. The case at bar presents (as did *Cool Moose*) the situation which the Tashjian Court anticipated in its footnote 13:

> Our holding today does not establish that state regulation of primary voting qualifications may never withstand challenge by a political party or its membership. A party seeking, for example, to open its primary to all voters, including members of other parties, would raise a different combination of considerations. Under such circumstances, the effect of one party's broadening of participation would threaten other parties with the disorganization effects which the statutes in *Storer v. Brown,* 415 U.S. 724 (1974), and *Rosario v. Rockefeller,* 410 U.S. 752 (1973), were designed to prevent.
>
> *Tashjian,* at 554, n. 13.

The associational rights which were decisive in *Tashjian* were tested from the opposite direction in *Jones.* In *Jones,* the Court held that California's blanket primary in which any primary election voter could, regardless of party affiliation, vote for any candidate for any office – violated the parties' right to define themselves as political associations. *Id.* at 577.

Tashjian and *Jones* provide convenient bookends for constitutional analysis, but generalizations based on those cases – regardless of which way the generalizations may cut – are treacherous. This is, in part, a result of the fact that the *party option* feature of plaintiffs' proposed format for open primaries undermines potent arguments which might otherwise be advanced in support of the challenged legislation. In this respect, *Tashjian* stands in stark contrast with *Nader v. Schaffer,* 417 F. Supp. 837 (D. Conn. 1976), summarily aff'd, 429 U.S. 989 (1976). In holding Connecticut's closed primary unconstitutional in *Tashjian,* the Court carefully noted that, in *Nader,* unlike *Tashjian,* the Republican Party *opposed* the plaintiff's effort to participate in the party's primary. *Tashjian,* at 212. The granting or withholding of a party's consent to participation in its primary by strangers is clearly significant for First Amendment purposes. Hence, many of the considerations which were decisive in *Jones,* where participation in the primary by strangers was legally compelled, have less force here. On the other hand, the case at bar affects political parties other than the party challenging the legislation in a manner and to an extent that was not present in *Tashjian,* but perhaps was anticipated in *Tashjian's* footnote 13. *Tashjian* and *Jones* thus provide a useful beginning point, but surely not the ending point, for any analysis of the issues in this case.

Tashjian and *Jones* teach that state-compelled political association (*Jones*) and state-precluded political association (*Tashjian*) can impair the associational rights guaranteed by the First and Fourteenth Amendments. These associational rights are clearly implicated in this case, because, regardless of whether it is "politically neutral," *Burdick v. Takushi,* 504 U.S. 428, 438 (1992), primary election legislation, by its very nature, regulates political behavior – it necessarily has "the effect of channeling expressive activity at the polls," *id.,* with consequent inevitable effects on the freedom of the contending political parties to advance their political goals as they see fit.

Resolution of a First Amendment challenge to the political regulation which is in question here also requires, as a preliminary matter, that the court take notice of some aspects of this case which may go far to inform an analysis of the burdens complained of by the plaintiffs and the justifications put forward by the state. As will be seen, there is more to this case than a single-axis analysis of whether we have state preclusion of political association that amounts to an unconstitutional deprivation of associational rights. Moreover, as relevant at this stage of the court's analysis, *Tashjian* and *Jones* teach, if they teach nothing else, that cases like the case at bar must be carefully analyzed in light of the totality of the circumstances presented by the state's primary election scheme (a point which is aptly illustrated by the fact that, for reasons which were satisfactorily explained by Richard Winger, an expert witness for the plaintiffs, the Republican and Democratic participation which the LPO so ardently seeks in Oklahoma was anathema to the California Libertarians in *Jones*). The court must thus "consider

the facts and circumstances behind the law," *Storer v. Brown,* 415 U.S. 724, 730 (1974), as was done, for example, in *Coalition* at 495-96, so that the constitutionality of the challenged provisions may be considered in the appropriate factual context as well as against the "backdrop of Oklahoma's other [primary election] laws." *Id.* at 496.

One highly conspicuous facet of this case has already been mentioned: the interests of other political parties are implicated here in a way which was simply not present in *Tashjian.* In *Tashjian,* the Connecticut Republican Party successfully asserted a constitutional right to invite *unaffiliated* voters to participate in its primary election. Imposition of the primary election format which was sought in *Tashjian* could have had only an indirect effect on the other political parties. None of the other parties were placed in the position of contributing voters to the Libertarian Party while maintaining a home for them on their registration rolls. In contrast, the party-option open primary format sought by the Libertarians in the case at bar would directly affect the other political parties and would make registered party affiliations significantly less meaningful in the Oklahoma primary election system.

Also significant is the fact that Oklahoma voters who are registered with a political party other than the LPO but wish to vote in the Libertarian primary can do so quite easily under the existing legislative scheme. They can change their registration to Libertarian or independent, and are entitled to do so not later than July 1 of any election year. 26 O.S. 2001 § 4-119. To be sure, the value of the option to change registration is reduced somewhat by the fact that the deadline for a change in registration falls just before the candidate filing period. 26 O.S. 2001 § 5-110. It is also true, however, that the identities of the

major party candidates (at least the viable ones) are almost always known well before the filing period begins. Voters who may be sufficiently disenchanted with the major parties to change their registration typically have ample opportunity to develop that disenchantment before the time for change of registration expires. Oklahoma's system thus imposes no substantial restrictions on the voter who may be nomadic in his political preferences. When that fact is borne in mind, it becomes apparent that the sharpest conflict presented by this case is the *party vs. party* conflict, rather than a *state vs. voter* conflict.

A final matter which is notable at this point is the role which the state plays under the legislation which is challenged in this case. Many cases in which state election laws are challenged involve *access* to the electoral competition. *See, e.g., Bullock v. Carter,* 405 U.S. 134 (1972); *Libertarian Party of Oklahoma v. Oklahoma State Election Board,* 593 F.Supp. 118 (W.D. Okla. 1984). This case, in contrast, involves the rules which govern the competition after all the contending candidates, and their political parties, have entered the field of play. In the former case, the state is a political gatekeeper – a role that assuredly invites skepticism. *See, e.g., Bullock* and *Williams v. Rhodes,* 393 U.S. 23 (1968). In this case, the state's role is more akin to that of a referee.[7] Thus, the challenged legislation is not aimed at minor parties in general, as in ballot access cases, or at the LPO in particular. As has been noted, it is politically neutral, and thus free of any

[7] This analogy may be imperfect because it may be at least arguable that the election apparatus being scrutinized in this case has been skewed as a result of nearly 100 years of two-party politics, thus compromising any claim by the state to neutral referee status.

obvious oligopolistic taint. Indeed, the prize sought in Oklahoma by the LPO – participation in the Libertarian primary by Republicans and Democrats – is that which the California Libertarians found repugnant in *Jones.* Thus we have here a nondiscriminatory restriction which the state's "important regulatory interests are generally sufficient to justify." *Burdick v. Takushi,* 504 U.S. 428, 434 (1992) (internal quotation omitted).

(b) The state's arguments based on the possibility of voter confusion and administrative difficulties, and paternalistic concerns, are unpersuasive.

Looking first to the justification which may be most quickly dismissed, the court rejects the state's argument that the semi-closed primary system should be perpetuated because the LPO would be harmed by giving it the option to open its primary. This paternalistic approach has been unequivocally rejected by the Supreme Court. Neither the state nor the court may constitutionally substitute its own judgment for that of the party as to the strategy best calculated to bring about electoral success. *Tashjian* at 554. Thus, even if the party's chosen strategy consisted of "self-destructive acts, that would not justify a state substituting its judgment for that of the party." *Eu v. San Francisco County Democratic Central Committee,* 489 U.S. 214, at 227-28 (1989). The state will fare no better with paternalistic justifications in the case at bar.

The specter of electoral raiding, as proffered by the state, is equally unpersuasive, both factually and legally. Raiding is a practice in which voters in sympathy with one party temporarily align themselves with another party so as to influence or determine the results of the other party's

primary. *Tashjian* at 219; *Rosario v. Rockefeller,* 410 U.S. 752, 760 (1973). As a factual matter, as has been discussed, the court is in a very poor position to assay the purity of the Libertarian voting electorate because the Libertarian registration rolls are periodically purged, with the result that, to an inherently unmeasurable extent, voters who have Libertarian political inclinations will either come to rest on the roll of unaffiliated voters or will register with one of the major parties for no reason other than to avoid repeatedly being purged to unaffiliated status. No instance has been cited in which, in any jurisdiction, a candidate has effectively hijacked the Libertarian Party for opportunistic reasons. The court is unable to find any significant possibility that opportunistic voters with no real allegiance to Libertarian principles would raid the Libertarian Party. (This is, of course, aside from the fact that the raiding argument is, at bottom, another paternalistic argument of the kind which has found little support from the Supreme Court.)

The state also argues that "swamping" is an evil to be avoided and that swamping would result from imposition of a party-option open primary format. Reduced to its essentials, swamping is the voting phenomenon by which a party's philosophical or political identity (or perhaps both) is lost as a result of primary election participation by non-party members in numbers vastly exceeding the number of voting party members. Referring to crossover voting in California's blanket primary in *Jones,* the Supreme Court noted that "these substantial numbers of voters who help select the nominees of parties they have chosen not to join often have policy views that diverge from those of the party faithful. *Jones,* at 578. By definition, swamping affects only minor parties whose registered

voter turnout is small in comparison to the available pool of primary election voters. Thus, if swamping is an evil to be avoided, it is an evil which affects only minor parties, in this case the Libertarian Party. Viewing the matter in this light, the court is, for the reasons discussed above with respect to raiding, disinclined to give decisive effect to an essentially paternalistic justification for Oklahoma's present semi-closed primary system.

As has been discussed, the state argues that the proposed party-option open primary format would lead to intolerable voter confusion. The court has resolved the voter confusion argument against the state on the facts (see part III, ¶¶ 21-23, above). The court will note, however, that as a legal matter, voter confusion has provided a slender reed upon which to rest a defense of primary election rules. On one hand, the state has unquestioned authority to control the election process. *Tashjian* at 217. However, this authority "does not extinguish the state's responsibility to observe the limits established by the First Amendment rights of the state's citizens." *Id.* Thus, the state's legitimate interests in preventing voter confusion and providing for educated and responsible voter decisions "in no respect make it necessary to burden the party's rights." *Id.* at 221-22 (internal quotation marks omitted). The court has no doubt that the need to avoid voter confusion would become constitutionally relevant if the court were confronted with a proposal which would clearly invite chaos on election day. We have no such situation here. The factual weakness of the state's voter confusion argument fortifies the court's conclusion that that argument is also legally without merit.

Finally, on the subject of administrative difficulties, Messrs. Ward and Clingman both alluded to administrative concerns in their testimony. The concerns voiced by Messrs. Ward and Clingman with respect to administrative difficulties are related to the voter confusion argument also advanced by the state. The essential argument is that if different voting eligibility rules applied to the various parties whose ballots would be available on primary election day, precinct-level snafus could create the situation which is the nightmare of any election official – the casting of questionable ballots in a number sufficient to render the outcome mathematically uncertain. While the court does not take lightly the suggestion that the engrafting of additional complications onto the primary election system might engender difficulties in administering that system throughout Oklahoma's 2251 precincts, the court has simply been provided no basis for a finding that the implementation of a party-option open primary system would create insuperable administrative burdens.

(c) <u>The state has adopted a politically neutral primary format which does not unconstitutionally burden the plaintiffs' First and Fourteenth Amendment Rights.</u>

As is discussed in part IV(A)(2), above, the court has concluded that because the challenged legislation is politically neutral, nondiscriminatory, and "regulatory" at least in the same sense that the write-in ban in *Burdick* was regulatory, the appropriate test is a balancing test, as was applied in *Timmons, Burdick* and *Tashjian*. The court hastens to add, however, that, on the facts of this case, application of a balancing test certainly does not foreshadow the final result. This case aptly illustrates the

Supreme Court's observation in *Timmons* that "[n]o bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms." *Timmons,* at 359.

"It is well settled that partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments," *Eu v. San Francisco County Democratic Central Committee,* 489 U.S. 214, 224 (1989). At the heart of this right of association is the constitutionally protected "freedom to join together in furtherance of common political beliefs," *Jones,* at 574 (internal quotation omitted), which is "protected by the Fourteenth Amendment from infringement by any State." *LaFollette,* at 121.

The protected activity which is involved in this case is not mere expression in the abstract sense. It is not mere debate, as important as that can be. Instead, it is the candidate selection phase of the political cycle – "the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Tashjian,* at 216. *See also, Jones* at 581 (candidate selection process is "the basic function of a political party").

Voters, as well as parties and their candidates, are also affected by Oklahoma's primary election scheme, whether it be plaintiffs' scheme or the state's. This is, to some extent, a result of the fact that "the rights of voters and the rights of candidates do not lend themselves to neat separation." *Bullock v. Carter,* 405 U.S. 134, 143 (1972). *See also, Cousins v. Wigoda,* 419 U.S. 477, 488 (1975); *Ripon Society v. National Republican Party,* 525 F.2d 567, 585 D.C. Cir. 1975); *Nader* at 845 ("An attempt to interfere with a party's ability to maintain itself is

simultaneously an interference with the associational rights of its members.")

These bedrock principles define the interests which are in play from the plaintiffs' vantage point.

With tenacity which the court cannot but admire, the LPO has struggled for more than twenty years in the courts and elsewhere in the public arena to gain a political foothold in Oklahoma. *See, e.g., Artunoff v. Oklahoma State Election Board,* 687 F.2d 1375 (10th Cir. 1982) (Libertarian Party challenge to ballot access rules); *Libertarian Party of Oklahoma v. Oklahoma State Election Bd.,* 593 F. Supp. 118 (W.D. Okla. 1984) (same); *Atherton v. Ward,* 22 F. Supp.2d 1265 (W.D. Okla. 1998) (Libertarian Party challenge to registration rules). It is now the judgment of the party's leadership (a judgment which no court may second guess, see p. 34, above) that the LAO's political ascent in Oklahoma will be facilitated by inviting members of other parties to give LPO politics a try by voting in the LPO primary without abandoning their registered party affiliation.

The LAO's freedom to implement its chosen strategy has collided with Oklahoma's semi-closed primary format. Subject to constitutional limitations and other exceptions not relevant here, it falls to the states to regulate elections. *See, e.g.* U.S. Const. Art. 1 § 4, Art. II, § 1; *Bush v. Gore,* 531 U.S. 98, 104 (2000). Even as to primaries, the role of government is unavoidable. *Burdick,* at 433 ("Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections"); *The Federalist No. 59* (1788) ("[I]t will therefore not be denied that a discretionary power over elections ought to exist somewhere."). However, as the

LPO would be quick to point out, where statutory law is concerned, the state is the creature of the parties in power, *e.g., Williams v. Rhodes,* 393 U.S. 23, 31-32 (1968), and is thus a bit suspect as a disinterested rule maker. It is necessary, therefore, to carefully evaluate those justifications for the challenged legislation which the state may plausibly offer (the court having previously discarded the implausible ones).

The right "to vote in any manner" and the right to associate for political purposes through the ballot are not absolute. *Burdick* at 433. Although the states are not permitted to "completely insulate the two-party system from minor parties' or independent candidates' competition and influence," *Timmons,* at 367, they do have a strong interest in the stability of their political systems. *Id.* at 366. The state's interest in political stability has been described as "not only permissible, but compelling." *Storer* at 736.

In *Timmons,* the Court had before it a challenge to Minnesota's anti-fusion rule, which prohibited a candidate from appearing on the ballot as the candidate of more than one party. *Timmons,* at 353-54. In a conclusion which resembles one of the LAO's arguments in this case, the Court of Appeals had held that the anti-fusion rule kept "the New Party from developing consensual political alliances and thus broadening the base of public participation in and support for its activities." *Id.* at 360 (internal quotation marks omitted). The state argued that it had an interest in avoiding voter confusion and overcrowded ballots, preventing party splintering and disruptions of the two-party system, and being able to clearly identify the election winner. *Id.* at 364. The Supreme Court held that the party's First and Fourteenth Amendment interests

were outweighed by the state's interest in enacting "reasonable election regulations that may, in practice, favor the traditional two-party system." *Id.* at 367. In dissent, Justice Stevens argued that the "true basis for the Court's holding [was] the interest in preserving the two-party system." *Id.* at 377. The majority saw no reason to quibble with this critique, and in fact embraced the proposition that, for the sake of tempering "the destabilizing effects of party-splintering and excessive factionalism," the state may nurture "a healthy two-party system" as long as there are no "unreasonably exclusionary restrictions." *Id.* at 367. It is thus clear that legislation which favors the two-party system is not, for that reason alone, on thin constitutional ice.

On the subject of the integrity of the electoral process, *Jones* teaches that state laws which may cause parties to skew their positions from those which they might otherwise take are constitutionally suspect. *Jones,* at 582. In *Jones,* the law in question was the blanket primary law which permitted any voter to vote for any candidate in any party's primary. This scheme was unsuccessfully defended by the state on the basis, among others, that the blanket primary forced the parties to moderate their positions, a justification which was emphatically rejected as "a stark repudiation of freedom of political association." *Id.* In the case at bar, the primary election format which plaintiffs assert is constitutionally *required* would have a quality which was identified as constitutionally *suspect* in *Jones*: the parties whose voters would be invited by the LAO into its primary would be induced, in an effort to retain voters who might be tempted to taste Libertarian politics without changing their registration, to skew their positions from those which they "would choose if left to their

own devices." *Id.* Of course, considerations which were influential in *Jones* must be carefully assessed for applicability to this case, because, in *Jones,* the open primaries were forced rather than optional. Hence, in *Jones,* the rules were applied to all parties whether they liked the rules or not, whereas, in the case at bar, the rule contended for by the plaintiffs would be applied to the LAO by consent and to the other parties without their consent. On this point, *Tashjian* becomes instructive. In *Tashjian,* the Court was at pains to distinguish between rules which "prevent[ed] the disruption of the political parties *from without*" and rules which "prevent[ed] the parties from taking *internal* steps affecting their own process for the selection of candidates." *Tashjian* at 224 (emphasis added). The primary election format sought by plaintiffs in the case at bar is a hybrid – it would "disrupt" other parties "from without" but would amount to an "internal step" for the LAO. The Oklahoma legislature has plainly laid down a bright-line rule as to the significance of registered party affiliation. Although this rule is at odds with the plaintiffs' preferred primary election format, the court concludes that Oklahoma's approach to primary elections embodies choices which the Oklahoma legislature was free to make without violating the First and Fourteenth Amendments.

It is clear that the "important regulatory interests," *Burdick* at 434, which may outweigh associational rights in the election law context may encompass matters of structure, stability and party integrity, as opposed to justifications, which this court has rejected, based on administrative convenience and avoidance of voter confusion. *See, e.g., Timmons* at 366-67; *Burdick* at 433-34 and 438; *Storer* at 736. In the case at bar, unlike *Jones,* granting the relief sought by plaintiffs would

impose an unwanted rule on parties other than the LAO. The state is entitled, at least in the regulatory sense which has been countenanced by the Supreme Court, to balance the political interests which are in play at the primary election stage of the election cycle by providing for a semi-closed primary. The judgments that are implicit in this format are judgments that the legislature was free to make, and it is clear under the relevant Supreme Court authorities that it is no answer to argue that the semi-closed primary format simply shores up the two-party system and values stability over the right of political association – especially where, as here, a voter who would like to try LAO politics may change his registered party affiliation only a few weeks before the primary election. (*Cf. Rosario,* where the Supreme Court declined to void the eight- to eleven-month cutoff for changes of registration for voting in New York's closed primary). Oklahoma's rules do not place burdensome requirements on the Republican and Democratic plaintiffs who, as would-be crossover voters, assert a constitutional right to participate in the primary of a party to which they do not belong (and, in the case of plaintiff Floyd Turner, a party which he emphatically refuses to join). *Jones* "stands, at least in part, for the proposition that the party's right to define its membership becomes meaningless if it cannot limit membership to those individuals who are willing to identify themselves with the party and its message." Borden, *Primary Elections,* 38 Hard. J. Legis. 263, 277 (2001).

Timmons, in which the Court upheld Minnesota's anti-fusion rule, is again instructive. Although the two

situations are not entirely congruent,[8] the fact that a state may bar one party from poaching another party's candidates without violating the First and Fourteenth Amendments plausibly suggests that the state may bar a party from poaching another party's primary election voters. The Court, in *Timmons,* answered the New Party's complaint by noting that the New Party was free to attempt to persuade the candidate to switch parties. *Id.* at 360. That practical remedy is equally available here, and would be equally efficacious in eliminating any constitutional violation which might otherwise appear. State-enforced party loyalty, or disincentives for disloyalty, may seem suspect, but they have received the sanction of the Supreme Court in cases in addition to *Storer. Cf. Nader v. Schaffer,* 417 F.Supp. 837, 847 (D. Conn. 1976), *aff'd* 429 U.S. 989 (1976): "[A] state legitimately may condition one's participation in a party's nominating process on some showing of loyalty to that party," and *Lippit v. Cipollone,* 404 U.S. 1032 (1972), affirming, without opinion, a decision upholding a statute banning primary election candidacies of those who had voted in another party's primary within the preceding four years.

The challenged provisions amount to "politically neutral regulations that have the effect of channeling expressive activity at the polls." *Burdick* at 438. Because the court has concluded that this legislation falls within the limits established by the First and Fourteenth Amendments, the court respectfully disagrees with the conclusion reached in *Cool Moose,* which was decided by the First Circuit with the benefit of Supreme Court's decision in

[8] Some concerns that were relevant in *Timmons,* but are not present in the case at bar, are discussed at 520 U.S. 365-66.

Tashjian but without the benefit of the Court's decision in *Jones*. The court in *Cool Moose* applied a balancing test, an approach with which this court agrees, as is discussed in part IV(A)(2), above. The First Circuit's comments in applying the balancing test may go far to explain the result reached by the court. The court noted arguments which could have been, but were not, made by the state in support of the Rhode Island closed primary. *Id.* at 86. The court went on to say that the state misconceived the nature of the Cool Moose Party's challenge, and expressly declined to bolster the state's feeble arguments on appeal. *Id.* at 86-88 ("We will not invoke justifications out of the whole cloth on appeal."). The court was left with "raiding" and even weaker administrative concerns as the only justifications offered to sustain the legislation, and those justifications were as unpersuasive with the First Circuit as they are with this court. None of the party integrity concerns which were decisive a year later in *Jones* were discussed.

Accordingly, balancing the interests which are at stake here, and recognizing the state's prerogatives in regulating elections even where that regulation has the effect of reinforcing party identity and shoring up the two-party system, the court concludes that the plaintiffs have not made their case, factually or legally, for imposition of a party-option open primary system in Oklahoma.

V.
Conclusion

The court commends the parties and their counsel for their outstanding presentations, both in writing and at trial. Falling, as it does, in the void between *Jones* on one hand and *Tashjian* on the other, this case invites appellate

review of the court's resolution of the difficult issues presented. By separate document, judgment will be entered in favor of the defendants.

DATED January 24, 2003.

/s/ S. P. Friot
STEPHEN P. FRIOT
UNITED STATES
DISTRICT JUDGE

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit or equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.)

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26 O.S. § 1-104:

A. No registered voter shall be permitted to vote in any Primary Election or Runoff Primary Election of any political party except the political party of which his registration form shows him to be a member, except as otherwise provided by this section.

B. 1. A recognized political party may permit registered voters designated as Independents pursuant to the provisions of Section 4-112 of this title to vote in a Primary Election or Runoff Primary Election of the party.

2. The state chairman of the party shall, between November 1 and 30 of every odd-numbered year, notify the Secretary of the State Election Board as to whether or not the party intends to permit registered voters designated as Independents to vote in a Primary Election or Runoff

Primary Election of the party. If the state chairman notifies the Secretary of the State Election Board of the party's intention to so permit, registered voters designated as Independents shall be permitted to vote in any Primary Election or Runoff Primary Election of the party held in the following two (2) calendar years. If the state chairman of one party notifies the Secretary of the State Election Board of the party's intent to so permit, the notification period specified in this paragraph shall be extended to December 15 for the state chairman of any other party to so notify or to change prior notification. A registered voter designated as Independent shall not be permitted to vote in a Primary Election or Runoff Primary Election of more than one party.

3. Failure to so notify the Secretary of the State Election Board shall serve to prohibit registered voters designated as Independents from voting in a Primary Election or Runoff Primary Election of the party.

or

4. A group of persons seeking to form a recognized political party pursuant to the provisions of Section 1-108 of this title shall, upon filing of the petitions seeking recognition of the political party with the Secretary of the State Election Board, notify the Secretary of the State Election Board as to whether or not the party intends to permit registered voters designated as Independents to vote in a Primary Election or Runoff Primary Election of the party. If the party is recognized and the group of persons seeking recognition of the party notifies the Secretary of the State Election Board of such intention, registered voters designated as Independents shall be permitted to vote in any Primary Election or Runoff

Primary Election of the party held prior to January 1 of the following even-numbered year.